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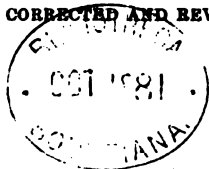
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BY  
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## ADVERTISEMENT

PREFIXED TO THE FIRST EDITION.

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THOUGH the Institutions of the Law of Scotland, which were written by the learned Sir George Mackenzie of Rosehaugh, have been justly received with universal approbation, it must, at the same time, be confessed that his fondness to reduce the Work within the compass of a small duodecimo led him either to omit altogether, or to treat more slightly, several important articles relating to his subject. Nor, indeed, is that Author's Compend so useful at present as it was formerly ; because of these many and considerable alterations which the Law of Scotland has undergone since its publication.

The following sheets are designed to supply these defects ; and, by exhibiting a more full and complete view of the principles and general system of our Law, to prepare the reader for deeper researches into that study.

Sensible of the difficulty of composing a Treatise of this kind, where every word requires accuracy and precision, I subjected my Essay, after having employed

my utmost skill upon it, to several Gentlemen distinguished by their knowledge of the Law ; to whom I embrace this public opportunity of offering my sincere acknowledgments for the trouble they have taken in revising it, and for their judicious remarks and just amendments.

If, after all I have done, this attempt shall answer my design, I shall be happy in reflecting that my labours have not been useless to my Country.

JOHN ERSKINE.

---

## PREFACE TO THE FOURTEENTH EDITION

BY

WILLIAM GUTHRIE, Esq., LL.D., ADVOCATE.

---

THOUGH the excellences of Erskine's Principles as a summary of Scots Law, and the authority of the book as the only work of its Author which received his last revising touches, have always been recognised, its usefulness has been impaired by the lapse of time, and the changes in the law produced by legislation and judicial decision. Nor during the century that has elapsed since the last publication in the Author's lifetime has the book ever been re-edited in the proper sense of the

term. A large proportion of the few notes given in the editions published under the care of Professor Schank More consists merely of references to the titles in Morison's Dictionary. Mr. Guthrie Smith published in 1860 "A New Edition, adapted to the present state of the law." But whatever advantages that book may have derived from Mr. Smith's power of lucid exposition, it did not supply the want of an edition of *Erskine's Principles*, the arrangement being different, many passages being omitted or re-written, and the divisions by which the Profession had been in the habit of referring to the book being altogether dropped out.

This attempt to make *Erskine's Principles* a convenient handbook for the student of the present day was undertaken at the request of Professor Macpherson, by whom the book has been restored to its original position as the Scots Law Manual in the Metropolitan University, and from whom the Editor has received valuable suggestions as to its plan. The Editor, while religiously preserving the whole text as it was left by the Author, has endeavoured to add, in notes, such information as it may be supposed that the Author would have embodied in the text if he had been writing now. He has thus had to travel over great part of the statute and case law of a hundred years. He has also pointed out the more important instances of discrepancy between the *Principles* and the *Institutes*; and to aid those who desire upon any subject to consult the fuller and most recent expositions of Mr. *Erskine*, references

to the corresponding passages in the Institutes have been given on the margin of each section. He has given the numerical references to the book and title of the passages in the Corpus Juris Civilis, which the Author cited according to the custom of his time; and he has filled up the references to the pages in Morison's Dictionary, where the cases quoted in the text are to be found,—an editorial duty which was omitted in every former edition.

The editorial work, commenced in the spring of 1869 and continued amid many interruptions, was completed in time to admit of the issue of the book to students in parts during the University session of 1869-70. The defects of execution which will be found to exist would have been much more serious, and indeed the completion of the task within this time would have been impossible, if the Editor had not been allowed to use the MS. Lectures of Mr. George Moir, Advocate, lately Professor of Scots Law in the University of Edinburgh. The extracts from these, whether they are in the form of foot-notes or of excursive notes at the end of Titles, have been printed as quotations, with the name of the learned author affixed. In order more effectually to supply the chief defect of the work of Mr. Erskine, since whose day Mercantile Law has been so greatly developed, it has been thought best to give the views of Mr. Moir on some branches of that subject in the form of continuous chapters at the end of Titles. Considerable

abridgment and rearrangement of the text of the Lectures has of course been necessary to adapt them to the purpose of the present work, but the words of the original have always been retained ; and that their authority might not be impaired, the whole of the extracts have been kindly revised in proof by Mr. Moir himself. The Editor's foot-notes to *Erskine* will be easily distinguished by the absence of marks of quotation ; and in a few cases additions to the foot-notes taken from Mr. Moir have been inserted within square brackets, thus [     ].

It is hoped that the use which has thus been made of the unpublished writings of so eminent a lawyer will give this volume a value and interest to the Profession which it could not otherwise have possessed.

The Editor has to acknowledge his obligations to those who have assisted him in the preparation of this Edition, especially to Professor MACPHERSON, who has read most of the proof sheets ; to Mr. JOHN CHEYNE, Advocate, who is entirely responsible for the Titles on Arrestments and Poindings, and on Crimes, and whose name is a sufficient guarantee for accuracy and legal knowledge ; and to Mr. COLIN H. M'LACHLAN, Advocate, who, besides giving other valuable assistance, has prepared the Index of Matters.

## PREFACE TO THE SIXTEENTH EDITION.

---

THE present edition is founded upon the two previous editions by Mr. Guthrie, and the objects he had in view in preparing them having been adhered to, they need not now be repeated.

The extent and importance of recent legislation and decision have made it a task of more labour than might be supposed, to adapt the previous notes to the law as it now stands; and I have to acknowledge much and valuable aid from my friend Mr. JOHN KIRKPATRICK.

N. M.

*June*, 1881.

## INDEX OF THE TITLES.

---

	PAGE
Note of Abbreviations, . . . . .	xiii
Index of Cases cited, . . . . .	xv

### BOOK I.

#### TITLE

I. Of Laws in general, . . . . .	1
II. Of Jurisdiction and Judges in general, . . . . .	10
III. Of the Supreme Judges and Courts of Scotland, . . . . .	23
IV. Of Inferior Judges and Courts, . . . . .	34
V. Of Ecclesiastical Persons, . . . . .	45
VI. Of Marriage, . . . . .	60
Note on International Law as to Marriage and Divorce, . . . . .	79
VII. Of Minors and their Tutors and Curators, . . . . .	82
Note on the Law relating to the Poor, . . . . .	111

### BOOK II.

I. Of the Division of Rights, and the several Ways by which a Right may be Acquired, . . . . .	121
II. Of Heritable and Moveable Rights, . . . . .	130
III. Of the Constitution of Heritable Rights, . . . . .	139

TITLE	PAGE
IV. Of the several Kinds of Holding, . . . .	156
V. Of the Casualties due to the Superior, . . . .	159
VI. Of the Right which the Vassal acquires by getting the Feu, . . . . .	185
VII. Of the Transmission of Rights by Confirmation and Resignation, . . . . .	209
VIII. Of Redeemable Rights, . . . . .	218
IX. Of Servitudes, . . . . .	229
X. Of Teinds, . . . . .	250
XI. Of Inhibitions, . . . . .	265
XII. Of Comprisings and Adjudications, . . . .	269

BOOK III.

I. Of Obligations and Contracts in general, . . . .	294
Note on General Requisites of Obligations and Contracts, . . . . .	304
II. Of Obligations by Word or Writ, . . . . .	308
III. Of Obligations and Contracts arising from Consent, and of Accessory Obligations, . . . . .	329
Note A—Delivery and Stoppage <i>in transitu</i> , . . . .	371
Note B—Law of Master and Servant, . . . . .	378
Note C—Bankruptcy of Private Companies, and Questions of Compensation, . . . . .	390
Note D—Joint-Stock Companies, . . . . .	392
Note E—Cash-Credit Bonds and Mercantile Guar- antees, . . . . .	397
Note F—Reparation, . . . . .	401
Note G—Contract of Affreightment, . . . . .	410
Note H—Contracts of Insurance, . . . . .	413
IV. Of the Dissolution or Extinction of Obligations, . .	422
V. Of Assignations, . . . . .	433
VI. Of Arrestments and Poidings, . . . . .	438

# INDEX OF THE TITLES.

xi

TITLE	PAGE
VII. Of Prescriptions, . . . . .	451
Note A—Prescription on Double Titles, . . . . .	473
VIII. Of Succession in Heritable Rights, . . . . .	476
IX. Of Succession in Moveables, . . . . .	528
Note A—Of the Law of Trusts, . . . . .	554
X. Of last Heirs and Bastards, . . . . .	569

## BOOK IV.

I. Of Actions, . . . . .	573
Note A—Bankruptcy, . . . . .	595
Note B—Civil procedure, . . . . .	611
II. Of Probation, . . . . .	619
III. Of Sentences and their Execution, . . . . .	633
IV. Of Crimes, . . . . .	646

## APPENDIX.

Charters, . . . . .	i
Disposition, . . . . .	iv
Bond and Disposition in Security, . . . . .	v
Part of Conveyancing Act, 1874, . . . . .	vi
Bills, Cheques, I.O.U., . . . . .	ix
Charter-Party and Bill of Lading, . . . . .	x
Policy of Marine Insurance, . . . . .	xi
Forms of Indictments, . . . . .	xiii
INDEX, . . . . .	xxi
ADDENDA, . . . . .	lxxiv



# NOTE OF ABBREVIATIONS, AND OF THE MANNER OF QUOTING AUTHORITIES.

---

Act S., . . . . .	Acts of Sederunt of the Session.
Books S., . . . . .	Books of Sederunt.
R. M., . . . . .	Books of <i>Regiam Majestatem</i> .
Q. Att., . . . . .	<i>Quoniam Attachiamenta</i> .
L. B., . . . . .	<i>Leges Burgorum</i> .
St. 1, R. I., . . . . .	<i>Statuta prima Roberti primi</i> , and so of the other Statutes in Skene's Collect.
Cr., . . . . .	Sir T. Craig, <i>De Feudis</i> , quoted by the page and section of edition 1732, fol.
Hope Min. Pr., . . . . .	Sir T. Hope's Minor Practicks, by page and section of edition 1726, 8vo.
Balf., . . . . .	Sir James Balfour's Practicks, quoted by the page and section.
Spotis. Pr., . . . . .	Sir R. Spotiswood's Practicks.
B. S., . . . . .	Brown's Supplement to Morison's Dic- tionary.
St., . . . . .	Viscount Stair's Institutions, by the book, title, and Section.
Bankt., vol. i., ii., or iii.,	Lord Bankton's Institute, by the volume, page, and section.
Elch., . . . . .	Elchies' Decisions, by the title and number of decision.

M., . . . . .	Morison's Dictionary of Decisions, by page.
F.C., . . . . .	Faculty Collection, 1808 to 1824.
S., . . . . .	Shaw's Reports, from 1821 to 1837.
D., . . . . .	Dunlop's Reports, from 1838 to 1860.
Macph., . . . . .	Macpherson's Reports, from 1861.
R., . . . . .	Rettie's Reports, from 1873.
Pat. Ap., . . . . .	Paton's Appeal Cases.
S. Ap., . . . . .	Shaw's Appeal Cases.
W. & S., . . . . .	Wilson and Shaw's Appeal Cases.
Bell's Ap., . . . . .	Bell's Appeal Cases.
Macq., . . . . .	Macqueen's Appeal Cases.
L. J., Q. B., C. B., Ex.,	Law Journal, Queen's Bench, Common Bench, Exchequer, &c.
L. R., Sc. Ap., . . . .	Law Reports, Scotch Appeals, &c.

The Author says :—" As for the decisions after 1719, which are neither to be found in any printed collection, nor in the Law Dictionary, some few, prior to Nov. 1744, were observed by the Author; and those from that period down to Nov. 1749, by the late Charles Areskine of Alva, Lord Justice-Clerk, who had the goodness to allow to the Author the use of his most valuable papers."

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## INDEX OF CASES CITED.

---

- A. v. B.*, 75, 297.  
*A. B. v. C. D.*, 77, 84.  
*Abercromby v. E. Peterborough*, 579.  
     *v. Breadalbane*, 187.  
*Aberdeen v. Smith and Paterson*, 431.  
*Aberdeen Bank v. Clark*, 337.  
*Aberdeen, Bishop of, v. Vis. Kenmure*,  
     213, 314.  
     *E. of, v. Laird*, 90.  
     *E. of, v. E. March*, 436.  
     *E. of, v. Scot's Crs.*, 444.  
     *King's College of, v. Hay*, 160.  
     *University of, v. Irvine*, 466.  
     *Un. of, v. Mags. of Aberdeen*, 564.  
*Aboyne, E. of, v. Farquharson*, 144.  
*Accountant of Court v. Forsyth*, 562.  
*Adam v. Campbell*, 551.  
     *v. Sutherland*, 208.  
     *v. M'Dougal*, 426.  
*Adamson v. L. Balmerino*, 575.  
     *v. Clyde Trs.*, 113.  
     *v. Paterson*, 41.  
     *v. Paxton*, 54.  
*Adamson's Trs. v. Scottish Provincial*  
     *Assurance Co.*, 421.  
*Addie v. Western Bank*, 345, 396.  
*Addison v. Row*, 125.  
*Adie v. Gray*, 549.  
*Adv.-Gen. v. Anstruther*, 90.  
     *v. Oswald*, 132.  
     *v. Swinton*, 211.  
*Advocate, Lord, v. Agnew*, 188.  
     *v. Balfour*, 353.  
     *v. Clyde Trs.*, 188.  
     *v. Lord Rollo*, 172.  
     *v. Sinclair*, 144.  
     *v. Skene*, 264.  
*Agnew v. E. of Stair*, 86.  
     *v. Stewart*, 483.  
*Ahanny v. Aiton*, 198.  
*Aikenhead v. Aikenhead*, 328.  
     *v. Aikenheads*, 90.  
     *v. Durham*, 95.  
     *v. Russel*, 510.  
*Aikie, M. of, v. Jeffrey*, 575.  
*Aitken v. Learmont*, 31.  
     *v. Findlay*, 624.  
*Aitchison v. Berry*, 194.  
     *v. Broughton*, 371.  
     *v. Hopkirk*, 173.  
*Alcock v. Easson*, 457.  
*Aldy, L.*, 520.  
*Alexander v. Badenach*, 462, 465.  
     *v. Dundas*, 147.  
     *v. C. of Dunmore*, 309.  
     *v. M'Lay*, 448.  
     *v. Steele*, 285.  
*Alison v. Proudfoot*, 196.  
*Allan v. Allan & Co.*, 423.  
     *v. Brander*, 454.  
     *v. Blencow's Trs.*, 603.  
     *v. Cameron's Crs.*, 156.  
     *v. Thomson*, 581.  
*Allan, Stewart, & Co. v. Stein's Crs.*,  
     372.  
*Allnutt v. Ashendean*, 400.  
*Amicable Society v. Bolland*, 421.  
*Anderson*, 382.  
     *v. Alexander & Millar*, 194.  
     *v. Blair*, 258.  
     *v. Cation*, 85, 91.  
     *v. Edie*, 419.  
     *v. Fletcher, Starkie, & Co.*, 606.  
     *v. Gordon*, 627.  
     *v. Garroway*, 496.  
     *v. Geddes*, 98.  
     *v. Marshall*, 173.  
     *v. Shiells*, 500.  
     *v. Saunders*, 233.  
     *v. Thomas*, 53.  
     *v. Town of Edinburgh*, 197.  
     *v. Union Canal Co.*, 114.  
     *v. Walker*, 605.  
     *v. Wood*, 462.  
*Andersons*, 685.  
*Andrew v. Syme & Co.*, 322.  
*Andrews v. Sawers*, 537.  
*Annand's Trs. v. Annand*, 627.  
*Anstruther v. Anstruther*, 248, 530.  
     *v. Anstruther's Tutors*, 52, 55.

- Anstruther v. Wilkie*, 307.  
*Arbuthnot v. Campbell*, 190.  
     *v. Colquhoun*, 194.  
     *v. Scot*, 325.  
*Arbuthnott v. Arbuthnott*, 243.  
*Archer v. Molyneux*, 382.  
*Archibald v. Macintyre*, 112.  
     *v. Lawson*, 551.  
*Arcus, James*, 673.  
*Argyle, E., v. Campbell*, 190.  
     *v. M'Donald*, 437.  
     *v. L. McNaughton*, 452.  
*Argyll, D., v. Murray*, 186.  
*Arniston v. Ballenden*, 527.  
*Arnot v. Greig*, 448.  
*Arrot v. Dempster*, 262.  
     *v. Young*, 62.  
*Arthur v. Lamb*, 498.  
*Ashburton's Trs., Lady, v. Cunningham*, 494.  
*Athole, M., v. L. Faskellie*, 188.  
*Atholl's Trs., D. of, v. Common Agent in Locality of Caputh*, 263.  
*Aubray v. Ross's Exrs.*, 366.  
*Auchinleck v. Gordon*, 671.  
*Auchintoul, L., v. L. Innes*, 147.  
*Auld v. Aikman*, 457.  
     *v. Heritors of Ayr*, 52.  
*Austin v. Wallace*, 94.  
*Ayton's Tutor*, 88.  
*Ayton v. Colvill*, 248.  
     *v. Scot*, 90.  
     *v. Tenants*, 198.  
  
*Baikie v. Sinclair*, 66, 277.  
*Baillie v. Carmichael*, 487.  
     *v. Clark*, 492.  
     *v. Grant*, 135.  
     *v. Menzies*, 628.  
*Bain v. Hamilton*, 144.  
     *v. Reeves*, 553.  
     *v. Magistrates of Wick*, 353.  
*Baird, &c., petrs.*, 86.  
     *v. Baird*, 662.  
     *v. Corbet*, 400.  
     *v. Haddow*, 65.  
     *v. Hamilton*, 401.  
     *v. Jaap*, 317.  
     *v. Magistrates of Dundee*, 465.  
     *v. Morrison*, 164.  
     *v. Pagan*, 305.  
     *v. E. Rosebery*, 503.  
     *Trs. v. Mitchell*, 156.  
*Bakers of Perth v. Millers*, 237.  
*Bald v. Buchanan*, 215.  
*Balfour v. Baird*, 405.  
     *v. Balfour's Trs.*, 370.  
     *L., v. Douglas*, 280.  
     *v. Wilkieson*, 278.  
*Balfours v. Forresters*, 95.  
*Balgony v. Hay*, 504.  
*Ballantyne, 64.*  
  
*Ballantyne v. Dundas*, 155.  
     *v. Muir*, 461.  
     *v. Watson*, 448.  
*Ballenden v. D. of Argyle*, 167.  
*Balmerino, Cred. of, v. Lady Couper*, 524.  
     *v. Hamilton*, 472.  
*Balnagowan v. Mackenzie*, 365.  
*Bank of England v. Ramsay*, 153.  
     *v. Stewart*, 605.  
*Bannatyne v. Brown's Trs.*, 423.  
     *v. Wilson*, 316.  
*Barbour v. Adamson*, 118, 119.  
     *v. Grierson*, 316.  
     *v. Hair*, 325.  
     *v. Halliday*, 125, 297.  
*Barclay, Robertson, v. Lennox*, 602.  
     *v. Pearson*, 65.  
*Baring v. Corrie*, 346.  
*Barns v. Allan & Co.*, 207.  
     *v. Barns*, 454.  
*Barr v. Neilsons*, 70.  
*Barron v. Rose*, 311.  
*Barry, Minister of*, 262.  
*Barstow v. Bennet*, 400.  
     *v. Stewart*, 150.  
*Bartilmo v. Hassington*, 493.  
*Bartlett v. Buchanan*, 243.  
*Barton v. Duncan*, 202.  
     *v. Hanson*, 343.  
*Barwick v. English Joint-Stock Bank*, 345.  
*Bathgate, Kirk Sess. of, v. Liddell*, 113.  
*Baxter*, 110.  
*Bayne, v. —*, 456.  
*Baynton, v. Swinton*, 365.  
*Beath v. Campbell, Rivers, & Co.*, 337.  
*Beattie v. Baird*, 108.  
     *v. Beattie*, 78.  
*Beattie, Johnston, v. Dalzell*, 79.  
     *v. Johnston*, 79.  
*Beatson v. Beatson*, 502.  
     *v. Macdonald*, 271.  
*Beaumont v. L. Glenlyon*, 230.  
*Beg v. Lapraik*, 540.  
*Begbie v. Boyd*, 209.  
*Begg v. Begg*, 435.  
*Belches v. Belches*, 295.  
     *v. Coran & Kinloch*, 639.  
     *v. Moore*, 54.  
*Bell v. E. of Wemyss*, 55.  
     *v. Herdman*, 460.  
     *v. Gartshore*, 218.  
     *v. Maxwell*, 568.  
     *v. Lamont*, 194.  
*Bell's Executors v. Murray*, 8.  
*Bells v. Wilkie*, 545.  
*Belshier v. Moffat*, 243.  
*Belshier's Crs. v. His Heir-apparent*, 291.  
*Benn v. Porret*, 347.  
*Berford, L., v. Kingston*, 264.  
*Berndtson v. Strang*, 373.

- Berny *v.* Nithsdale, 253.  
 Berry *v.* Walker and Roger, 31.  
 Berwick, petr., 559.  
 Berwickshire, Comm. of, *v.* Craw, 571.  
 Bethune, 197.  
     *v.* His Tenants, 21.  
     *v.* Jervise, 191.  
 Bethune's Tenants *v.* Bethune, 203.  
 Biggart *v.* City of Glasgow Bank, 68.  
 Bimmerside, L., *v.* Halyburton, 469.  
 Binny *v.* Binny, 249.  
 Binning *v.* Cra. of Auchinbreck, 281.  
 Birkley *v.* Presgrave, 354, 355.  
 Birnie *v.* Montgomery, 588.  
 Birrel *v.* Moffat, 313.  
 Birtwhistle *v.* Vardill, 80.  
 Bisset *v.* Bisset, 628.  
     *v.* Walker, 491.  
 Black *v.* Caddel, 402.  
     *v.* Cochrane, 561.  
     *v.* Cuthbertson, 432.  
     *v.* Incorpor. of Bakers of Glasgow, 371.  
     *v.* Pitmedden, 274.  
 Blackadder *v.* Erskine, 629.  
     *v.* Milne, 455.  
 Blackie *v.* Clegga, 606.  
 Blackwood *v.* Forbes, 356.  
     *v.* Marshall, 266.  
     *v.* Sutherland, 443.  
 Blaikie *v.* Aberdeen Railway Co., 564.  
 Blain *v.* Paterson, 561.  
 Blair *v.* Blair, 498.  
     *v.* Bryson, 338.  
     *v.* Shedden, 467.  
     *v.* Stewart, 291.  
     *v.* Taylor, 356.  
     Cra. of, 248.  
 Blair, Ferguson, *v.* Allan, 307.  
 Blair Iron Co. *v.* Alison, 338.  
 Blairs *v.* Mitchell, 91.  
 Blantyre, L., *v.* Dunn, 173, 433.  
     *v.* Walkinshaw, 96, 99.  
 Blaw *v.* Blaw, 283.  
 Blonay, Baroness de, *v.* Oswald's Repa., 76.  
 Bluett *v.* Osborne, 333.  
 Blyth's Trs. *v.* Hall, 547.  
 Boak *v.* Megget, 371.  
 Boettcher *v.* Carron Co., 406.  
 Bogg *v.* Davidson, 442.  
 Bogle *v.* Ballantyne's Cra., 391.  
     *v.* Dunmore, 372.  
 Bogle and Gordon *v.* M'Caul, 523.  
 Bogue *v.* Wight, 191.  
 Bohtlingk *v.* Inglis, 373, 375.  
 Bonar *v.* Macdonald, 358.  
 Bones *v.* Morrison, 546.  
 Bonhard, Cra. of, 277.  
 Bontine *v.* Graham, 215, 285.  
 Borthwick *v.* Arbuthnot, 177.  
     *v.* Borthwick, 488.  
 Borthwick *v.* Crawford, 462.  
     Lady, *v.* Borthwick's Cra., 246.  
     Lord, *v.* Gallowshiels, 189.  
     L., *v.* Scott, 468.  
 Boswell *v.* D. of Portland, 55.  
     *v.* Inglis, 234.  
     *v.* Lindsay, 644.  
     *v.* Miller, 368.  
 Bovill *v.* Dixon, 325, 375.  
 Bower *v.* Cowper, 582.  
     *v.* Earl of Marischall, 519.  
 Bowman *v.* Bowman, 78.  
 Boyd *v.* Hamilton, 243, 244.  
     *v.* Malloch, 279.  
     *v.* Ponton, 642.  
     *v.* Storie, 318.  
 Boyle, 89.  
 Braco, L., *v.* Ogilvy, 267.  
 Braid, William, 648.  
 Braid *v.* Ralston, 481.  
 Braidy *v.* Fairny, 317.  
 Brand's Trs., 131.  
 Breadalbane, M. of, 76.  
     *v.* Campbell, 159.  
 Breadalbane's Trs. *v.* Chandos, 538, 540.  
     *v.* Lady E. Pringle, 540.  
     *v.* M. Chandos, 541.  
 Brechin, Town of, *v.* Arbuthnot, 150, 152.  
 Brisbane *v.* Monteith, 357.  
     *v.* Dacres, 351.  
 Bristow *v.* Sequeville, 316.  
 British Linen Co. *v.* Esplin, 426.  
     *v.* Monteith, 397.  
 Brock *v.* L. Bargany, 362.  
     *v.* Newlands, 321.  
     *v.* Hamilton, 352.  
 Brodie *v.* Dyce, 108.  
     *v.* E. Moray, 47.  
     *v.* M'Lellan, 446.  
 Brodies *v.* Stephen, 542.  
 Brown's Tutors, 88.  
     *v.* Bruce's Cra., 581.  
     *v.* Campbell, 479.  
     *v.* Dow, 623.  
 Brown *v.* Edgington, 333.  
     *v.* Elmsley, 160.  
     *v.* Fleming, 437.  
     *v.* Fletcher, 238.  
     *v.* Henderson, 511.  
     *v.* Kinloch, 234.  
     *v.* Somerville, 431.  
     *v.* Stephenson & Co., 450.  
 Brown *v.* Bain and Purdie, 321.  
 Browne *v.* Burns, 62.  
 Brownlie *v.* Brownlie's Trs., 562, 563.  
 Bruce *v.* Bruce, 328.  
     *v.* Bruce, 484.  
     *v.* Bruce, 485, 494.  
     *v.* Bruce, 519.  
     *v.* Bruce, 530.  
     *v.* Forbes, 106.  
     *v.* Hamilton, 86, 96.

- Bruce v. Paterson, 72.  
 Bruhn v. Grunwald, 17.  
 Bryce v. Graham, 104.  
 Brydone v. Stewart, 403.  
 Bryson v. Chapman, 482.  
     v. Crawford, 555.  
 Buccleuch, D. of, v. Erskine, 353.  
     v. Hialop, 205.  
     v. M'Turk, 426.  
     v. E. Tweeddale, 541.  
 Buccleuch, Duchess of, v. Doul, 423.  
 Buchan, Earl of, v. Erskine, 487.  
     v. Cardross, 84.  
     v. M'Donald, 523.  
 Buchanan v. Angus, 136, 558.  
     v. Carrick, 483.  
     v. Royal Bank, 553.  
     v. Buchanan's Trs., 539.  
 Buck v. Steinman, 402.  
 Buckingham, Duchess of, v. Winter-  
     botham, 80.  
 Budd v. Fairmanner, 333.  
 Bule v. Gordon, 72.  
 Buntin v. Boyd, 236.  
     v. Buntin, 369.  
 Burnett, 422.  
 Burnett v. Gibb, 253.  
     v. Lepers, 68, 504.  
     v. Morrow, 328.  
     v. Swan, 162.  
 Burnet's Crs. v. Murray, 32.  
 Burn v. Purvis, 17.  
 Burns, James B., and Others, 660.  
 Burns v. Lawrie's Trs., 438.  
 Burrell v. Burrell, 136.  
 Burt v. Bell, 429.  
 Bute, Lady, v. Sheriff of Bute, 69.  
     M. of, v. Mags. of Rothesay, 56.  
 Caddel v. Burns, 260.  
     v. Sinclair, 378.  
 Caithcheon v. Ramsay, 452.  
 Caithness, C. of, v. E. of Caithness, 72.  
     v. E. Rosebery, 548.  
 Calder, 584.  
     v. Calder, 626.  
     v. Dickson, 533.  
     v. Provan, 325.  
 Caledonian Bank v. Kennedy's Trs., 604.  
 Callander v. Callander's Trs., 317.  
 Callendar v. Carruthers, 264.  
 Callender, E. of, v. Hamilton, 482.  
 Cambridge v. Anderton, 416.  
 Cameron v. Murray, 380.  
     v. M'Lean, 66.  
 Campbell, 164.  
 Campbell, petr., 559.  
 Campbell v. Anderson, 346.  
     v. Breadalbane, 287.  
     v. Bryson, 223.  
     v. Campbell, 62, 78.  
     v. Campbell, 84.  
 Campbell v. Campbell, 85.  
     v. Campbell, 89.  
     v. Campbell, 107.  
     v. Campbell, 191.  
     v. Campbell, 222.  
     v. Campbell, 324.  
     v. Campbell, 361.  
     v. Campbell, 458.  
     v. Campbell, 499.  
     v. Campbell, 539.  
     v. Campbell, 554.  
     v. Campbell of Edderline's Trs.,  
         271, 567.  
     v. Coll. of Glasgow, 260.  
     v. Douglas, 311.  
     v. Dunn, 157.  
     v. Faikney, 440.  
     v. Fyfe, 379.  
     v. Gordon, 268.  
     v. Grant, 93.  
     v. Grierson, 460.  
     v. Hamilton, 173.  
     v. Honeyman, 61.  
     v. Johnston, 202.  
     v. Keith, 367.  
     v. Kennedy, 402.  
     v. M. Breadalbane, 483.  
     v. M'Kinnon, 197.  
     v. M'Naughton, 164.  
     v. Macvicar, 285.  
     v. Napier, 425.  
     v. Paul, 574, 610.  
     v. Rose, 366.  
     v. Scotland, 278.  
     v. Tait, 624.  
     v. Thomson's Trs., 7.  
     v. Wightman's Repra., 487.  
     v. Turner, 619.  
     v. York Buildings Co., 587.  
     v. M'Glashan, 350.  
 Campbell's Trs. v. Campbell, 537.  
     v. Dingwall, 147.  
     v. Sinclair, 52.  
     v. Thomson, 337.  
 Campbell of Auchinbreck's Crs. v.  
     Lockwood, 293.  
 Campbelton, Mags. of, v. Galbraith,  
     188, 454.  
 Cameron, 108.  
     v. Boswell, 446.  
     v. Chapman, 17, 591.  
     v. Fletcher, 379.  
     v. Macdonald, 203.  
     v. Paul, 621.  
 Cant v. Borthwick, 485, 488.  
     v. Edgar, 134.  
 Carfin, L., 459.  
 Carlton v. Gordon, 515.  
 Carlyle v. Crs. of Easter Ogle, 281.  
 Carmichael v. Adamson, 118.  
     v. Carmichael, 427.  
 Carnegie v. Durham, 367.

- Carnegy v. Carnegy, 137, 248.  
     v. Scott, 129, 205.  
     v. Speid, 54.  
 Carnousy, L., v. Keith, 160.  
 Carrick v. Carse, 461.  
     v. Coll. of Glasgow, 260.  
 Carruthers v. Barclay, 249.  
     v. Johnston, 64, 243.  
 Carse v. Russell, 479.  
 Carson v. M'Micken, 588.  
 Carstairs v. Brown, 234.  
 Carstairs, Bruce, v. Greig, 55.  
 Carswell, 338.  
 Carter v. Whalley, 340.  
 Castryben, L., petr., 508.  
 Cassie v. General Assembly of Church  
     of Scotland, 49.  
 Cassilis, E. of, v. Macadam, 196.  
     v. M'Martin, 308.  
     v. E. of Winton, 509.  
 Cathcart v. E. of Cassilis, 505.  
     v. Cathcart, 136, 482.  
     v. Dick's Repra., 320.  
 Cauvin v. Robertson, 428.  
 Cawdor, Earl of, v. Lord Adv., 52.  
 Chalmers v. Baillie, 70.  
     v. Chalmers, 70.  
     v. Cunningham, 281.  
     v. Marshall, 553.  
     v. Potter, 167.  
     v. Watson, 546.  
 Chancellor v. Chancellor, 530.  
 Chanter v. Hopkins, 333.  
 Chappel (Talbot) v. Guidet, 426.  
 Cheap v. Arnot, 320.  
 Cheilie v. Cuthbert, 389.  
 Cheyne v. Cook, 49.  
 Chiesley v. Calderwood, 644.  
     v. Chiesly, 138.  
 Chirnside v. Currie, 602.  
 Chisholm v. Lady Bray, 73.  
     v. Chisholm-Batten, 221.  
     v. Gordon, 431.  
 Christian v. Kennedy, 382.  
 Christie v. Christie, 500.  
     v. Henderson, 464.  
     v. Royal Bank, 424, 527.  
 City of Glasgow Bank v. Gillespie and  
     Parkhurst, 563.  
     Directors of, 673.  
 Clackmannan, L., v. E. of Wigton, 213.  
 Clark v. Brodie, 125.  
     v. Johnston, 642.  
 Clarkson v. Edgar, 362.  
 Cleghorn v. Elliot, 129.  
     v. Taylor, 402.  
 Cleland v. L. Pitliver, 209.  
 Clement v. Sinclair, 79.  
 Clerk v. Gordon, 145.  
     v. Loos, 441.  
 Clerk v. Hyndman, 619.  
     v. Lamont, 192.  
 Clerk v. Stewart and Watson, 580.  
     v. Waddell, 315.  
     v. Watson, 578.  
     Trs. v. Hill, 240.  
 Clerkington, Lady, v. Stewart, 479.  
 Clerk's Cra. v. Gordon, 89.  
 Clift v. Schwabe, 421.  
 Clinton v. Trefusis, 246.  
 Clinton, Lord, 559.  
 Clunie v. Stirling, 579.  
 Clunie's Cra. v. Sinclair, 443.  
 Clyde Trustees, 407.  
 Clydesdale, Marquis of, 89.  
 Clydesdale, M., v. E. Dundonald, 486,  
     522.  
 Clyne v. Clyne's Trustees, 129.  
 Cochran v. Cochran, 91.  
     v. Gechin, 630.  
     v. Ramsay, 516.  
 Cochrane v. Black, 91, 92.  
     v. Stoddart, 49.  
     v. Baillie, 485.  
     v. Bathgate, 11.  
     v. Bogle, 271, 277.  
     v. Cochrane's Exrs., 534.  
     v. Ewart, 240.  
     v. Ferguson, 459.  
     v. Smith, 467.  
 Cochrane, 11.  
 Cockburn v. Cockburn, 272.  
 Cockburn-Ross v. Heriot's Hospital,  
     173.  
 Cockburn's Trs. v. Dundas, 529.  
 Cockburnspath, 119.  
 Codrington v. Johnstone, 433.  
 Colehan v. Cook, 324.  
 Collet v. Master of Balmerinloch, 574.  
 College of Justice v. Town of Edin.,  
     28.  
 Collie v. Pirie's Trs., 327.  
 Collier v. Collier, 540.  
 Collins v. Marquis's Cra., 376.  
 Collow's Trs. v. Connell, 486.  
 Colombian Insur. Co. v. Ashby, 355.  
 Colquhoun v. Colquhoun, 69, 515.  
     v. Mags. of Dumbarton, 188.  
     v. Rosebank, 71.  
     v. Watson, 191.  
 Coltart v. Tait, 170.  
 Commrs. of Highland Roads v. Mackray,  
     19.  
 Commercial Bank v. Pollock's Trs.,  
     393.  
 Commercial Bank of Aberdeen v. Cal-  
     lander, 397.  
 Commissaries of Edin. v. E. Panmure,  
     541.  
 Condie v. Stewart, 92.  
 Connell v. Grierson, 486.  
 Conway v. Beazeley, 81.  
 Cook v. Bell, 402.  
 Cooke v. Falconer's Repra., 336.

- Cooper v. Barr and Shearer, 303.  
 Cooper and Aves v. Clydesdale Shipping Co., 333.  
 Cormack v. Anderson, 605.  
 Cornfoot v. Powke, 345.  
 Corry v. Muirhead, 450.  
 Corsar v. Durie, 284.  
 Coupar's Reprs. v. Skelbo's Crs., 272.  
 Couston v. Millar, 314.  
 Coutts v. Crawford, 528.  
     v. Straiton, 312.  
 Cowan v. Ramsay, 327.  
     v. Stewart, 230.  
 Cowie v. Brown, 526.  
 Craig v. Craig, Cred. of Riccarton, 487.  
     v. Ferrie, 421.  
     v. Galloway, 73.  
     v. Greig and Macdonald, 119.  
     v. Jex-Blake, 410.  
     v. Lindsay, &c., 96.  
     v. Paton, 356, 579.  
 Craik's Trs. v. Craik, 377.  
 Cranston v. Brown, 534.  
 Cranstoun v. Elliot, 261.  
     v. Home, 22.  
 Craven v. Elibank's Trs., 86, 98  
 Craufurd v. E. of Murray, 428.  
 Crawlour v. Graham, 499.  
 Crawford v. Bennet, 98.  
     v. Campbell, 590.  
     v. Craufurd, 100.  
     v. Halkerston, 238.  
     E. v. Ure, 542.  
     v. Hamilton, 645.  
     v. Hotchkis, 432.  
     v. Petrie, 118.  
     v. Stewart, 206.  
 Craufurd v. Durham, 452.  
     v. Edinburgh, 570.  
     v. Piper, 321.  
 Crawshaw v. Maule, 340.  
     v. Collins, 341.  
 Crichton v. L. Ayr, 192, 193.  
     v. Gibson, 320.  
     v. F. of Queensberry, 206.  
     v. Robb, 15.  
     v. Syme, 355.  
 Crichton's Cra. v. Christian Knowledge Society, 511.  
 Crosbie's Tra. v. Wright, 370.  
 Crowder v. Watson, 18.  
 Cruickshanks v. Mitchell, 322.  
     v. Watt, 265.  
 Cubbison v. Hyslop, 454.  
 Cullen v. Johnston, 393.  
     v. Smeal, 456, 457.  
     v. Wemyss, 427, 464.  
 Cumming v. Cumming's Trs., 241.  
     v. Cumming, 480.  
     v. Skeoch's Tra., 314.  
 Cunningham v. Agnew, 320.  
     v. His Curators, 97.  
 Cunningham v. Dunlop, 231.  
     v. Grieve, 194.  
     v. Semple, 326.  
     v. Wardrop, 48.  
     & Co. v. Wilson & Co., 430.  
 Cuninghame v. Boswell, 366.  
     v. Cuninghame, 62.  
 Cuninghame, Smith, v. Anstruther, 499.  
 Cunyngham v. Whiteford, 89.  
 Currie v. M'Lean, 378.  
 Curry v. Crawford, 206.  
 Curryhill, L., v. Cumming's Exrs., 549.  
 Cuthbertson v. Lyon, 462.  
 Da Costa v. Jones, 307.  
 Dalby v. India and London Life Assurance Society, 419.  
 Dalgarno v. Tolquhoun, 425.  
 Dalgleish and Fleming v. Sorley, 339.  
     v. Hamilton, 87.  
 Dalhousie v. Dunlop & Co., 207.  
     v. Gilmour, 249.  
     E. of, v. Somers, 263.  
 Dalkeith, E. of, v. Book, 310, 326.  
 Dallas v. Paul, 349.  
 Dalling v. Mackenzie, 71.  
 Dalmahoy and Wood v. Mags. of Brechin, 366.  
 Dalrymple v. Dalrymple, 62.  
     v. Johnston, 445.  
     v. M'Gill, 384.  
     v. E. of Stair, 215.  
 Dargie v. Mags. of Forfar, 407.  
 Darling v. Campbell, 246.  
 Darlington v. Gray, 364.  
 Darroch v. Ranken, 171.  
 Davidson, 556.  
     v. Alcorn, 100.  
     v. Boyd, 424.  
     v. Clark, 544.  
     v. Davidson, 349.  
     v. Monklands Rail. Co., 405.  
 Dawson v. Lauder, 604.  
     v. Stirton, 566.  
 Dean v. Mags. of Irvine, 142.  
 Deans v. Cromby, 199.  
 Deans of Chapel Royal, 257.  
     v. Johnstone, 466.  
 Dempster v. Cleghorn, 230.  
 Denholm v. Johnston, 591.  
 Dennistoun v. Mudie, 98.  
 Denny v. M'Nish, 84.  
 Deuchar v. Brown, 627.  
 Devaynes v. Noble, 423.  
 Dewar, 94.  
     v. M'Kinnon, 492.  
     v. Miller, 338.  
     v. Nairne, 383.  
     v. Paterson, 505.  
 Dick v. Goodall, 441.  
     v. Gutzmer, 579.  
     v. G. N. of Sc. Ry. Co., 31.

- Dick *v.* Lands, 208.  
*v.* Oliphant, 328.  
*v.* Skails, 195.
- Dickie *v.* Thomson, 356.
- Dicks *v.* Mamsie, 67.
- Dickson *v.* Cunningham, 483.  
*v.* Dickie, 586.  
*v.* Dickson, 247.  
*v.* Halbert, 351.  
*v.* Kincaid, 305.  
*v.* Maitland, 501.  
*v.* Murray, 577.  
*v.* M'Culloch, 181.  
*v.* Stansfeld, 431.
- Dicksons *v.* Trotter, 436.
- Dingwall *v.* Gardiner, 52.
- Disbrow *v.* Mackintosh, 546.
- Dixon *v.* Baldwin, 373.  
*v.* Campbell, 200.  
*v.* Yates, 376.
- Dixons *v.* Monkland Canal Co., 351.
- Dobbie *v.* Johnston, 396.  
*& Co. v.* Nisbet, 446.
- Dobie *v.* Richardson, 76.  
*v.* Stevenson, 192.
- Dods *v.* Fortune, 194.
- Donald *v.* Donald, 77.  
*v.* Colquhoun, 523.
- Donaldson, 22.  
*v.* Donaldson, 100.  
*v.* Cockburn, 439.
- Donaldson's Trs. *v.* Forbes, 239.
- Dooley *v.* Dickson, 284.
- Dougal *v.* Murdoch, 626.
- Douglas, 108.  
*v.* Brown, 325.  
*v.* Carlyle, 170.  
*v.* Dickson, 138.  
*v.* Douglas, 499, 539.  
*v.* Douglas's Trs., 298, 350, 367.  
*v.* Douglas and Drummond, 494.  
*v.* Duke of Hamilton, 483.  
*v.* Erakine, 325.  
*v.* Jackson, 449.  
*v.* Mason, 441.  
*v.* M'Michael, 133.  
*v.* Stirling, 67.
- Douglas, Crs. of, *v.* Douglas, 442.
- Douglas, Heron, & Co. *v.* Bank of England, 293.  
*v.* Riddick, 461.
- Douglases *v.* Douglas, 296.
- Dowl, 256.  
*v.* Home, 359.
- Dove *v.* Smith, 531.  
*v.* Henderson, 265.
- Dow *v.* Dow, 588.
- Dowie *v.* Cunningham, 224.
- Doyle *v.* Dallas, 418.
- Downie, petr., 559.
- Downie *v.* Campbell, 148.  
*v.* Downie's Trustees, 134.
- Downie *v.* M'Killop, 328.
- Drain & Co. *v.* Scott, 347.
- Drummond *v.* Alexander, 628.  
*v.* Campbell, 550, 552.  
*v.* Drummond, 501.  
*v.* Feuars of Bothkennel, 95.  
*v.* Hera. of Monzie, 56.  
*v.* Kennedy, 581.  
*v.* Rollock, 74.
- Drysdale *v.* Johnston, 460.
- Du Bost *v.* Beresford, 307.
- Duck *v.* Maxwell, 423.
- Dudgeon *v.* Brodie, 371.  
*v.* Dudgeon's Trustees, 551.
- Duff *v.* Alves, 550.  
*& Brown v.* Forbes, 581.  
*v.* E. of Fife, 312.  
*v.* Innes, 459.
- Duffus, Lord, *v.* Monro, 625.
- Durham *v.* Durham, 473.
- Durie *v.* Coutts, 136.
- Dury *v.* Ramsay, 365.
- Dunbar *v.* Murdoch, 629.
- Duncan *v.* Bruce, 308.  
*v.* Clyde Trs., 344.  
*v.* Findlater, 407.  
*v.* Hill, 115.  
*v.* Robertson, 499.  
*v.* Scrimzeour, 316.
- Duncanson *v.* Duncanson, 91.
- Dundas *v.* Dundas, 142.  
*v.* M'Leod, 17.  
*v.* Morison, 610.  
*v.* Murray, 489.  
*v.* Nicolson, 53.  
*v.* L. Hamilton, 519.  
 Lord, *v.* Presby. of Zetland, 49.
- Dundee, Mags. of, *v.* Kid, 171.  
*v.* E. of Lauderdale, 48.  
*v.* Nicol, 48.
- Dundee Harbour Trs. *v.* Dougal, 454.
- Dundonald, E. of, *v.* Barr, 173.  
*v.* Boye's Trs., 454.
- Dunlop *v.* Johnston, 73, 497, 568.  
*v.* Robertson, 121.  
*v.* Scott, 373.
- Dunmore & Co. *v.* Allan, 415.
- Dunse, Bailies of, *v.* Mudie's Crs., 638.
- Dyce, 45.  
*v.* Hay, 229.
- Dykes *v.* Dykes, 498.
- Earlsferry, Mags. of, *v.* Malcolm, 230.
- Eccles *v.* Merchiston Crs., 604.
- Edgar *v.* Johnston, 512.  
*v.* Maxwell, 473, 514.
- Edinburgh, Mags. of, 637.  
*v.* Edinburgh Roperie Co., 184.  
*v.* Scott, 454.  
*v.* Coll. of Justice, 28.  
*v.* Horsburgh, 166.  
*v.* Whitehead, 184.

- Edin. Glass House Co. *v.* Shaw, 388.  
 Edin. & Glas. Ry. Co. *v.* Hall, 112.  
     *v.* Adamson, 114.  
 Edin. Water Co. *v.* Hay, 6.  
 Edmund *v.* Grant, 580, 598.  
     *v.* Gordon, 435.  
 Edmonstone *v.* Edmonstone, 483.  
     *v.* Lang, 355.  
     *v.* Primrose, 535.  
 Edward *v.* Fyffe, 424.  
 Elams *v.* Fisher, 357.  
 Elder *v.* Allan, 448.  
     *v.* Hamilton, 457.  
     *v.* M'Lean, 62.  
     *v.* Watson, 549.  
 Eleis *v.* Keith, 72, 267.  
 Elgin, Earl of, *v.* Fergusson, 79.  
     *v.* Wellwood, 199.  
 Elibank, Lord, *v.* Callander, 580.  
     *v.* Campbell, 215.  
 Elliot, 364.  
     *v.* Duke of Buccleuch, 196.  
     *v.* Maxwell, 453.  
 Ellis *v.* Eden, 562.  
 Elphinston, Lord, *v.* Earl of Mar, 506.  
     *v.* Robertson, 91.  
 Emslie *v.* Duff, 190.  
 Erskine *v.* Cormack, 360.  
     *v.* Erskine's Trs., 526.  
     *v.* E. Lauderdale, 366.  
     *v.* Manderson, 361.  
     *v.* Robertson, 628.  
     *v.* Smith, 628.  
     *v.* Wright, 156.  
     *v.* Hamilton, 172.  
 Evans *v.* Drummond, 340.  
     *v.* M'Loughlan, 41.  
 Ewan *v.* Ewan's Trs., 426.  
 Ewart *v.* Latta, 361.  
 Ewen *v.* Watt, 540.  
 Ewing *v.* Drummond, 132.  
     *v.* Semple, 571.  
 Eyres *v.* Hunter & Campbell, 21.  
  
 Fairholm *v.* Livingstone, 459.  
 Fairlie *v.* Cunningham, 484.  
     *v.* Fairlie, 77.  
 Fairy *v.* Inglis, 330.  
 Falconer *v.* Blair, 553.  
     *v.* Dougal, 534.  
     *v.* Hay, 570.  
     *v.* M'Leod, 350.  
 Farquhar *v.* Farquhar, 486.  
 Farquharson *v.* Farquharson, 193.  
     *v.* Lord Advocate, 455.  
 Fea *v.* Elphinston, 626.  
 Fead *v.* Maxwell, 493.  
 Featherstonhaugh *v.* Fenwick, 340.  
 Fegan *v.* Thomson, 94.  
 Fell *v.* Lord Ashburton, 382.  
 Fenton *v.* Livingston, 63.  
 Ferguson *v.* Braah, 188.  
  
 Ferguson *v.* Ferguson, 479.  
     *v.* Gillespie, 257.  
     *v.* M'Kenzie, 389.  
     *v.* Maitland, 621.  
     *v.* Malcolm, 822.  
     *v.* More, 428.  
     *v.* Muir, 457.  
     *v.* Paterson, 310, 311.  
     *v.* Sheriff, 187.  
     *v.* Welsh, 603.  
 Fernie *v.* Colquhoun, 73.  
 Ferrier *v.* Graham, 146.  
 Ferrier's Trs. *v.* Bayley, 70, 184.  
 Feuars of Dalkeith *v.* D. of Buccleuch,  
     260.  
 Fife's Trs., Earl of, *v.* Maga. of Aber-  
     deen, 152.  
     *v.* Wilson, 193.  
     *v.* Cumming, 188.  
     *v.* Duff, 518.  
     *v.* Earl of Fife's Trs., 9.  
 Fyfes *v.* Kedalia, 370.  
 Findlay *v.* Donaldson's Trs., 365.  
 Findlay, Bannatyne, & Co. *v.* Donald-  
     son, 366.  
 Findlay and Others, 566.  
 Fiscal of Edinburgh *v.* Campbell, 621.  
 Fisher *v.* Dixon, 130, 131, 537, 539, 540.  
     *v.* Fisher's Trs., 539.  
     *v.* Samuda, 333.  
 Fisher's Trs. *v.* Fisher, 493, 530.  
 Fitzherbert *v.* Mather, 345.  
 Flemming *v.* Carstairs, 100, 101.  
     *v.* Flemming, 502.  
     *v.* Imrie, 433.  
     *v.* Macdonald, 200.  
     *v.* Twaddle, 448.  
     *v.* Wilson and M'Lellan, 643.  
 Flint *v.* Alexander, 426.  
 Flockhart *v.* Kirk Session of Aberdeen,  
     113.  
 Flowerdew's Trs., 565.  
 Fogo *v.* Colquhoun, 258.  
     *v.* Fogo, 486, 501, 515.  
 Fork *v.* Fyfe, 13.  
 Forbes *v.* Anderson, 231.  
     *v.* Brebner, 601, 603.  
     *v.* Gammell, 485.  
     *v.* Innes, 423.  
     *v.* Livingstone, 452.  
     *v.* Luckie, 533.  
     *v.* Salton's Exrs., 197.  
     *v.* Steil, 302.  
     *v.* Welsh, 357.  
 Forbes & Co. *v.* Duncan, 433.  
 Forbes, Sir W., & Co. *v.* Dundas, 400.  
     *v.* Edin. Life Assurance Co., 421.  
 Forbes, Lady, 248.  
 Ford, 16.  
     *v.* Ford, 368.  
 Fordyce *v.* Brydges, 249.  
 Forman *v.* Burns, 547, 561.

- Forrester v. Hutchison, 144.  
 Forrest v. Carstairs' Repra., 370.  
 Forsyth v. Nicholl, 113.  
 Fortune's Exra. v. Smith, 455.  
 Foster v. Frampton, 374.  
 Fotheringham v. Fotheringham, 494.  
 Fowke v. Duncan, 533.  
 Fowler v. Campbell, 93.  
 Fowlie v. M'Lean, 190.  
 Fowlis v. Fowlis, 526.  
 Frame v. Hart & Hodge, 336.  
 Fraser, 15.  
 Fraser v. Brebner, 190.  
 Fraser, L., v. Fraser, 279.  
     v. Fraser, 106.  
     v. Lancaster, &c., 175.  
     v. M'Kenzie, 468.  
     v. Rose, 368.  
 French v. Muirkirk Iron Co., 552.  
 Frith v. Buchanan, 545.  
 Frog's Children v. His Crs., 492.  
 Fuller v. Wilson, 345.  
 Fullerton v. Crawford, 202.  
     v. Dalrymple, 489.  
     v. Hamilton, 458.  
 Fulton, 69.  
 Fulton v. Blair, 319.  
     v. Fulton, 350.  
     v. Johnston, 311.  
 Fultons v. Fulton, 93.  
  
 Gall v. Bird, 349.  
     v. Greenhill, 352.  
 Galbraith v. Lesley, 98.  
 Gallie v. Ross, 462.  
 Galloway, 87.  
     v. Craig, 497.  
     v. Thomson, 312.  
 Gammell v. Cathcart, 485.  
 Gardner, 107.  
     v. Davidson, 551.  
     v. Stevenson, 551.  
     v. The Trinity House of Leith, 566.  
 Gardyne v. Royal Bank of Scotland, 569.  
 Garioch v. Forbes, 190.  
 Garnock, V., v. Master of Garnock, 486.  
 Gartshore v. Cockburn, 265, 581.  
 Ged v. Baker, 453.  
 Gellatly, v. Arrol, 233, 469.  
 Gemmil v. Yule, 72.  
 Gentle v. M'Lellan, 380.  
 George v. Claggett, 346.  
 Gibbs v. Mersey Docks and Harbour  
     Board, &c., 408.  
 Giblin v. M'Mullen, 299.  
 Gibson, 648.  
     v. Forbes, 371, 608, 606.  
 Gibson & Thomson v. Sharp & Robb, 88.  
     v. Sharp, 94.  
 Gibson-Craig v. Cochrane, 242.  
 Giles v. Lindsay, 271, 568.  
 Gilmour v. Finnie, 361.  
  
 Gilmour v. Gilmour, 530.  
     v. Gordon, 484.  
 Gillon v. Muirhead, 196.  
 Glasgow, Maga. of, v. Crawford, 239.  
     Earl of, v. Hamilton, 196.  
 Glen v. Hume, 177.  
 Gloag v. Macintosh, 459.  
 Glyn v. Hartel, 400.  
 Gobbi v. Lazzaroni, 455.  
 Goddard v. Stewart's Children, 495.  
 Godsall v. Boldero, 419.  
 Goldie v. Murray's Trustees, 570.  
 Goldston v. Young, 142, 310.  
 Goodin v. Murray, 630.  
 Goodsir v. Carruthers, 564.  
 Goodwin v. Sawers, 84.  
 Gordon, 23.  
 Gordon v. Abernethy, 643.  
     v. Campbell, 63, 546.  
     v. Cheyne, 438.  
     v. Cruickshanks, 621.  
     v. Davidson, 68.  
     v. L. Drum, 548.  
     v. L. Drum & Auchlossin, 500.  
     v. Farquhar, 70.  
     v. Forbes & Innes, 325.  
     v. Gordon's Trs., 19, 486.  
     v. Grant, 188, 189, 232, 352.  
     v. Hope, 449.  
     v. Howden, 298.  
     v. Hunter, 272.  
     v. Inglis, 75.  
     v. Lealy, 370.  
     v. Marjoribanks, 234.  
     v. Gordon, 148.  
     v. Milne's Trs., 533.  
     v. Milne's Representative, 204.  
     v. Pain, 70.  
     v. Robertson, 200.  
     Duke of, v. Gillon, 257.  
     Lady Henr., v. Tyrie, 461.  
 Gordon's Crs. v. Towry, 99.  
 Gordon's Trs. v. Eglinton, 566.  
 Goskirk v. Edin. Railway Access Co., 199.  
 Goss v. Nelson, 324.  
 Gourlay v. Wright, 464.  
 Govan v. Boyd, 310, 326.  
     v. Seton, 547.  
 Gow v. Lang, 65.  
 Gowans v. Christie, 200.  
     v. Oswald, 462.  
     v. Thomson, 626.  
 Graeme v. Murray, 550.  
     v. Ross, 280.  
     v. Ure, 240.  
 Graham v. Bruce, 445.  
     v. Earl of March, 89.  
     v. Graham's Crs., 523.  
     v. Graham's Trs., 558.  
     v. L. Stonebyres, 457.  
     v. Veitch, 424.  
     v. Watt, 468.

- Graham, Lady C., *v.* Hopetoun, 136.  
 Grahame *v.* Burn, 61.  
     *v.* Cochran, 462.  
     *v.* Douglas, 453.  
     *v.* Don, 145.  
     *v.* Gillespie, 319.  
     *v.* Graham, 501.  
     *v.* Grahame, 577.  
     *v.* Greig, 233.  
     *v.* Hope, 533.  
     *v.* Hunter, 271.  
     *v.* Logie, 625.  
     *v.* M'Queen, 528.  
 Graitney, *Crs.* of, 604.  
 Grant *v.* Cunningham, 583.  
     *v.* Gordon, 47.  
     *v.* Gordon, 188.  
     *v.* Grant, 465, 477.  
     *v.* Grant's *Crs.*, 599.  
     *v.* Grant's *Tra.*, 477.  
     *v.* Hill, 443.  
     *v.* Leslie, 75.  
     *L., v.* Mackintosh, 253, 470.  
     *v.* M'Gregor, 626.  
     *v.* M'Leay, 335.  
     *v.* Murray, 532.  
     *v.* Peddie, 14.  
     *v.* Sutherland, 523.  
 Gratiudine, *The*, 347.  
 Gray, &c., 94.  
 Gray, &c., *petrs.*, 150.  
 Gray, Sir James, *v.* Callender, 550.  
     *v.* Dundas, 565.  
     *v.* Ferguson, 230.  
     *Lord v.* Hope, 315.  
     *v.* Pantou, 138.  
     *v.* Reid, 426.  
     *v.* Smith & Boyle, 472.  
     *v.* Walker, 133.  
 Greenock *v.* Greenock, 479.  
 Greenock Banking Co. *v.* Smith, 426.  
 Greig, 236.  
     *v.* Adamson & Craig, 118.  
     *v.* Duke of Queensberry, 467.  
     *v.* Greig, 553.  
     *v.* Heriot's Hospital, 113.  
     *v.* Myles, 117.  
     *v.* Univ. of Edinburgh, 113.  
 Grieve *v.* Macfarlan, 310.  
     *v.* Williamson, 145.  
 Grierson *v.* Mags. of Dumfries, 642.  
     *v.* Ramsay, 136, 441.  
     *v.* E. Sutherland, 319.  
     *v.* Tailzifer, 106.  
 Grill *v.* Gen. Screw Collier Co., 299.  
 Groat *v.* Sutherland, 364.  
 Grosat *v.* Cunningham, 645.  
 Guthrie *v.* Dunbar, 187.  
     *v.* Cowan, 498.  
     *v.* Mackerston, 249.  
 Hackman *v.* Fernie, 421.  
 Hadden *v.* Shorswood, 328.  
 Haddington, B. of, *v.* E. Haddington, 48.  
     *v.* Richardson, 440.  
     *E., v.* His Tenant, 204.  
 Haig *v.* Forbes, 211.  
 Haining, I., *v.* Selkirk, 235.  
 Haldane *v.* Douglas, 427.  
     *v.* Faculty of Advocates, 27.  
     *v.* Haldanes, 512.  
 Halford *v.* Rymer, 418.  
 Halkerton, L., *v.* Drummond, 508.  
 Halliburton *v.* Maxwell, 102.  
 Hall *v.* Fuller, 319.  
     *v.* M'Auley and Lindsay, 549.  
     *v.* Nisbet, 206.  
     Sir James, *v.* Craw, 163.  
 Halley *v.* Lang, 203.  
 Hamilton, 199.  
 Hamilton, 559.  
     *v.* Bennett, 554.  
     *v.* Bonar, 505.  
     *v.* Emalie, 336.  
     *v.* Fullerton, 444.  
     *v.* Hamilton, 92.  
     *v.* Hamilton, 464.  
     *v.* Hamilton, 502.  
     *v.* Hamilton, 505.  
     *v.* Kirkwood, 117.  
     *v.* Lady Ormiston, 455.  
     *v.* Matheson, 100.  
     *v.* Montgomery, 145.  
     *D. of, v.* Earl of Selkirk, 479, 500.  
     *Tra. v.* Fleming, 199.  
     *D. of, v.* Scott, &c., 53.  
     *v.* Vis. Oxford, 486.  
     *v.* Wilson, 501.  
     *v.* Wood, 303.  
     *v.* Western Bank, 437.  
 Hamper, 337.  
 Hansen *v.* Craig & Rose, 332.  
 Hannah, John, 685.  
 Hannah *v.* Guthrie, 533.  
 Hanson *v.* Meyer, 332.  
 Hard *v.* Anstruther, 250.  
 Hardie *v.* Austin & M'Aslan, 305.  
     *v.* Kirk-Session of Linlithgow, 113.  
 Hardies *v.* Hardie, 369.  
 Hardcastle *v.* South Yorkshire Railway Company, 405.  
 Harkness *v.* Graham, 98.  
 Harlaw *v.* Heritors of Peterhead, 55.  
 Harper *v.* Faulds, 430.  
 Harris *v.* Mags. of Dundee, 239.  
 Harrowers *v.* Horn, 240.  
 Hartshaw *v.* Hartwoodburn, 101.  
 Harvey *v.* Chessels, 70.  
     *v.* Farquharson, 79.  
     *v.* Forrest, 9, 20.  
     *v.* Harvey, 108.  
     *v.* King's Coll. of Aberdeen, 202.  
     *v.* Lindsay, 230.  
     *v.* M'Intyre, 98.

- Harvie v. Craig Buchanan, 473.  
 Hastings, Mar. of, v. Oswald, 211.  
 Hatton, L., v. Earl of Northesk, 163.  
 Havilland, Routh, & Co., v. Thomson, 348.  
 Hawarden v. Dunlop, 287.  
 Hawkins v. Hawking, 137.  
 Hawtayne v. Bourne, 345.  
 Hay v. Beatie & Hardie, 117.  
     v. Com. Agt. of Alyth, 263.  
     v. Croall, 118.  
     v. Cuming, 117.  
     v. Cumming, 75.  
     v. Dorman, 115.  
     v. Edin. Water Com., 114.  
     v. E. Eglinton, 644.  
 Lord AL., v. E. Glasgow, 179.  
     v. Elliot, 206.  
     v. Hay, 484.  
     v. Hay, 514.  
     v. Keith, 206.  
     v. Kerr, 455.  
     v. Marshall, 574.  
     v. Morine, 117.  
     v. Murie's Cra., 162.  
     v. Paterson, 120.  
     v. Rogers, 119.  
     v. Roxburgh, D., 256, 259.  
     v. Wright, 327.  
 Lord Alfred, v. Spot's Cra., 130.  
 Hay & Thomson v. Murray, 118.  
 Hay & Wood, petrs., 195.  
 Heberton, v. Milne, 39.  
 Heggie v. Heggie, 391.  
 Heirs of Roseburn, 247.  
 Henderson, Thomas, 648.  
 Henderson v. Burt, 470.  
     v. Henderson, 497.  
     v. Sinclair, 325.  
     v. Wilson, 521.  
 Hepburn v. Duke of Gordon, 189.  
     v. Hamilton, 622.  
     v. Hepburn, 105, 487.  
     v. Richardson, 208.  
     v. Seton, 248.  
 Herbertson v. Rattray, 363.  
 Herdman v. Borthwick, 359.  
 Heritors of Cadder v. Glasgow, Minrs. of, 259.  
     v. Glasgow College, 260.  
     v. Insch v. Storie, 53.  
     of Kingoldrum v. Haldane, 53.  
     of Pitaligo v. Gregor, 53.  
 Heriot v. Bird, 579.  
     v. Ker, 289.  
 Heriot's Hospital v. Alvis, 237.  
     v. Hepburn, 467.  
 Heriots v. Fleming, 44.  
 Heron v. Espie, 65, 136.  
     v. Syme, 154.  
 Herries, Farquhar, & Co. v. Brown, 495, 568.  
 Herries, Lord, v. Maxwell's Curator, 250.  
 Hertz v. Itzig, 446.  
 Higgins v. Dunlop, 307, 309.  
 Hill v. Hill, 182.  
     v. Lindsay, 391, 435, 436.  
     v. Mackay, 211.  
     v. Merchant Co. of Edinburgh, 210.  
 Hialeside, Lady, v. Baillie, 434.  
 Hialop v. Durham, 402.  
 Hitchcock v. Humphry, 400.  
 Hodge v. Fraser, 246.  
     v. Hodge, 222.  
     v. Story, 363.  
 Hogg v. Gow, 61.  
     v. Low, 459.  
 Hog v. Laahley 530.  
 Hogs v. Hog, 369.  
 Holwell v. Cuming, 327.  
 Home, 256.  
     v. E. Home, 625.  
     v. Home, 428.  
     v. Logan, 477.  
     v. Purves, 316.  
     v. Stewart, 224.  
     v. Watson, 539.  
 Homes v. Bonnar, 425.  
 Hope v. Common Agt. of Cupar, 264.  
     v. Dickson, 349.  
     v. Hope, 148.  
 Hope, Earl of Lothian, 111.  
 Hopetoun, E. of, v. E. of Rosebery, 47.  
     v. Hunter's Tra., 193.  
     v. Officers of State, 187.  
     v. Scots Mines Co., 320.  
     v. Wight, 193.  
 Horne, v. Breadalbane Tra., 148.  
     v. Rennie, 484.  
 Horne and Elphinstone v. Murray, 435.  
 Houldsworth v. City of Glasgow Bank, 345.  
 Houston v. Common Agent of Haddington, 256.  
 Houston's Executors v. Speirs, 400, 423.  
 Howat's Tra. v. Howat, 543.  
 Howden v. Crichton, 531, 536.  
     v. Glasford, 143.  
     v. Sibbald, 102.  
 Howie v. Anderson, 307.  
 Howison v. Howison, 461.  
 Huber v. Steiner, 465.  
 Hume v. Hume, 349.  
     v. Seaton, 367.  
     v. Taylor, 195.  
 Hunter v. Boog, 145.  
     v. Chalmers, 147.  
     v. Fry, 411.  
     v. Miller, 353.  
     v. Duke of Roxburghe, 253.  
     v. Thomson, 459.

- Hutchison, 516.  
     *v. Cassillis*, 52.  
     *v. Fraser*, 117.  
     *v. Town of Edinburgh*, 57.  
 Hyndford *v. Dickson*, 287.  
 Hyalop *v. Maxwell*, 531.  
     *v. Shaw*, 160.  
  
 Inches, L., 238.  
 Inglis *v. Austin*, 338.  
     *v. Charteris*, 588.  
     or *Buchan v. Harper*, 317.  
     *v. Inglis*, 525.  
     *v. Mirrie*, 547.  
     *v. Moir's Tutors*, 200.  
     *v. Port Eglintoun Spinning Co.*, 377.  
 Innercauld, L., *v. E. Aboyne*, 576.  
 Innes *v. Innes*, 107.  
     *v. Innes*, 630.  
     *v. Magistrates of Edinburgh*, 402, 407.  
 Inveraw, Lady, *v. E. of Breadalbane*, 471.  
 Inveresk *v. Tranent*, 111.  
 Irvine, *v. E. Aberdeen*, 485.  
     *v. Gordon*, 366.  
     *v. Hart*, 21.  
     *v. Irvine*, 278.  
     *v. Maule*, 258.  
     *v. Maxwell*, 292.  
     *v. Spence*, 91.  
 Irving *v. Carruthers*, 626.  
     *v. Copland*, 461.  
     & *Jopp*, 198.  
     *v. Swan*, 103.  
 Islay, Ministers of, *v. Heritors*, 257.  
 Isles, Bishop of the, *v. Hamilton*, 263.  
  
 Jack *v. Begg*, 125.  
     *v. Isdale*, 115.  
     *v. Jack*, 82.  
     *v. Lyall*, 234.  
     *v. Pollock*, 297.  
 Jack's Trs. *v. Marshall*, 539.  
 Jackson *v. Drummond*, 280.  
     *v. Cockburn*, 546.  
 James *v. Catherwood*, 316.  
 Jamieson *v. Gillespie*, 322.  
 Jardine *v. Currie*, 73.  
     *v. M'Farlane*, 343.  
 Jardine's Trs. *v. Carron Co.*, 338.  
 Jeffrey *v. Blair*, 519.  
     *v. Brown*, 560.  
     *v. Campbell*, 496.  
 Job *v. Langton*, 355.  
 Johnson *v. Otto*, 84.  
 Johnstone's Trs., 204.  
 Johnstone *v. Stott*, 8.  
 Johnston *v. Black*, 117.  
     *v. Brown*, 61.  
     *v. Burnet*, 605.  
  
 Johnston *v. Chalmers*, 253.  
     *v. Clark*, 309.  
     *v. Cuninghame*, 493.  
     *v. Cullen*, 191.  
     *v. Dobie*, 135.  
     *v. Goodlet*, 627.  
     *v. Home*, 582.  
     *v. Johnston*, 277.  
     *v. Johnston*, 518.  
     *v. Owen*, 399.  
     *v. Pettigrew*, 9.  
     *v. Robertson*, 429.  
     *v. Scott*, 455.  
     *Sharp & Co. v. Phillips*, 338.  
 Joel *v. Gill*, 607.  
 Jones *v. Bright*, 333.  
     *v. Just*, 333.  
 Junquet la Pine *v. L. Semple's Crs.*, 326.  
 Justice *v. Murray*, 79.  
  
 Kay *v. Pollock*, 340.  
 Keddell *v. Duncan*, 98.  
 Keir *v. Creditors of Menzies*, 435, 440.  
     *v. Magistrates of Stirling*, 407.  
 Keith *v. L. Braco*, 576.  
     *v. Innes*, 500.  
     *v. Johnstone's Tenants*, 190.  
     L. *v. Keir*, 401.  
     *v. Keith's Trs.*, 536, 539, 541.  
     *Logie*, 131.  
     *v. Stonehaven Commissioners*, 234.  
 Keith's Trs. *v. Keith*, 350.  
 Kelhead *v. Wallace*, 226.  
 Kello *v. Pringle*, 100.  
 Kelly *v. Solari*, 351.  
 Kemp *v. Ferguson*, 531.  
 Kennedy, 91.  
 Kennedy, 338.  
     *v. Alison*, 201.  
     *v. Arbuthnot*, 319, 524.  
     *v. Buick*, 575.  
     *v. Kennedy*, 134.  
     *v. Ker*, 640.  
     *v. M'Douall*, 457.  
 Ker *v. Lady Covington*, 622.  
     *v. Erskine*, 531.  
     *v. Hay*, 317.  
     *v. Innes*, 481.  
     *v. Ker's Trs.*, 526.  
     *v. Primrose*, 286.  
     *v. Scot*, 644.  
     *v. Scott*, 169.  
     *v. Scott*, 527.  
     *v. Wauchope*, 526.  
     *v. M. of Ailsa*, 4, 11, 40.  
     *v. Bremner*, 462.  
     *v. Hunter*, 311.  
 Kermick *v. Watson*, 17.  
 Kerr, Ladies M. and E., *petrs.*, 4.  
     *v. Martin*, 109, 633.

- Kibble v. Stewart, 152.  
 Kidd v. Kidds, 496.  
 Kilbucko, L., v. Poldeans, 284.  
 Kilkerran, Lord, v. Couper, 582.  
     v. Paterson, 311.  
 Kilpatrick, 117.  
 Kincaid v. Aikenhead, 645.  
     v. Dickson, 294.  
 Kincardine v. Murray, 98.  
 Kindly Tenants of Lochmaben, 198.  
 King v. Chalmers, 151.  
     v. Eadale, 325.  
     v. Jeffrey, 249.  
     v. King, 630.  
     v. Wieland, 129.  
 King's Adv. v. Cra. of Cromarty, 163.  
 Kinghorn, E., v. Town of Forfar, 44.  
 Kinglasie, Insp. of, v. Kirk Sess., 113.  
 Kinloch and Others, 558.  
     v. Kinloch, 498.  
     v. Rait, 73.  
     v. Wilson, 186.  
 Kinnoull, E., v. Gordon, 49.  
 Kippen v. Oppenheim, 199.  
 Kirk v. Gilchrist, 263.  
 Kirkcaldy, Magistrates of, v. Greig, 188.  
 Kirkpatrick v. Kirkpatrick, 143.  
 Kirkwood v. Grant, 257.  
     v. Lennox, 118, 120.  
     v. Manson, 118.  
 Knight v. Knight, 484.  
     v. Wedderburn, 110.  
 Knox v. Brand, 586.  
 Kruger v. Wilcox, 431.  
 Kyle v. Kyle, 106.  
  
 Lag, L., v. —, 547.  
     v. Grierson, 159.  
 Laidlaw v. Smith, 443.  
 Laing v. Cheyne, 580.  
     v. Fidgeon, 333.  
 Laird v. Laird's Tra., 561, 564.  
 Lambert v. Smith, 202.  
 Lamb v. M'Donald, 520.  
 Lamington, L., v. Jolly, 85.  
 Lamont v. Rankin's Tra., 185, 211.  
 Landell v. Landell, 18.  
     v. Purves, 336.  
 Lane v. Cotton, 408.  
 Lang v. Brown, 424.  
 Langton, Creditors of, 227.  
 Lashley v. Hogg, 539.  
 Letta v. Edin. Eccl. Commrs., 250.  
 Leachope, L., v. Cleghorne's Tenants,  
     424.  
 Lauderdale, E. of, v. Swinton's Tenants,  
     623.  
     D. of, v. E. of Tweeddale, 467.  
 Laurie v. Denny's Tra., 431.  
     v. Donald, 432.  
     v. Laurie, 218, 285, 609.  
     v. Stewart, 361.  
  
 Laury v. Maxwell, 311.  
 Lauriston, L., v. Sher. of Mearns, 173.  
 Law v. Humphrey, 325.  
 Lawson v. Gilmour, 246.  
     v. Gunn, 120.  
     v. Udney, 511.  
 Learmont v. Russell, 623.  
     v. Shearer, 271, 441.  
 Learmonth v. City of Edinburgh, 253.  
 Leck v. Chalmers, 230, 469.  
 Leckie v. Leckies, 328.  
 Leddy v. Gibson & Co., 405.  
 Lees v. Parlan, 15.  
     v. Mackinlay, 147.  
 Leiper v. Cochran, 98.  
 Leith, 489.  
 Leith Bank v. Bell, 358.  
     v. Garden, 436.  
 Leith's Tra. v. Leith, 525.  
 Leny v. Leny, 486.  
 Lennox v. Campbell, 362.  
     v. Hamilton, 146, 147.  
     v. Linton, 477.  
 Leslie v. Aberdeen Bank, 395.  
     v. Cumming, 234.  
     v. Dick, 489.  
     v. Forbes, 142, 572.  
     v. Leslie, 62.  
 Lealy v. Nicholson, 135, 324.  
 Leven, E. of, v. Morrison, 225.  
     E. of, v. Montgomery, 68.  
 Lickbarrow v. Mason, 375.  
 Liddel v. Barclay, 148.  
     v. Rob, 60.  
     v. Wilson, 506.  
 Lidderdale's Cra. v. Naismyth, 304.  
 Life Assur. Co. of Scotland v. Foster,  
     420.  
 Lindores, L., v. Stewart, 328.  
 Lindsay v. Oswald, 483.  
     v. Davidson, 609.  
     v. Dott, 492.  
     v. Giles, 609.  
     v. Mar. of Huntly, 482.  
     v. N. W. Railway Co., 17.  
 Lindsay's Cra., 525.  
 Linlithgow, Mags. of, v. Mitchell, 453.  
 Linwood v. Hawthorn, 461.  
 Lipmann v. Don, 465.  
 Lithgow v. Cra. of Whitehaugh, 269.  
 Littlejohn v. Allen, 323.  
 Livingston v. Begg, 74.  
     v. Grant, 49.  
     v. Presbytery of Hamilton, 20.  
 Loch v. Dick, 103.  
 Lockhart v. D. of Gordon, 469.  
     v. Dundas, 580.  
     v. Durham, 236.  
     v. Ferrier, 214.  
     v. L. Bargany, 441.  
     v. M'Kenzie's Tra., 95.  
     v. Paterson, 236, 549.

- Lockhart *v.* Wingate, 568.  
 Logan, L., 97.  
     *v.* Galbraith, 243.  
     *v.* Logan, 327.  
 Lolly, 81.  
 London Joint-Stock Bank *v.* Stewart  
     & Co., 319, 347.  
 Longmuir, 21.  
 Longworth *v.* Yelverton, 61, 619, 621,  
     622.  
 Lord *v.* Colvin, 559, 560.  
 Loudon, E. of, *v.* L. Ross, 293.  
 Lour, L., *v.* Lady Craig, 582.  
 Lovat, L., *v.* L. Macdonald, 222.  
 Lowndes *v.* Buchanan, 199.  
 Lowrie *v.* Mercer, 630.  
 Lowson *v.* Ford, 532.  
 Lucas *v.* Gardner, 4.  
 Ludquhairn, L., *v.* L. Gight, 370.  
 Lumsdaine *v.* Gordon, 338.  
 Lumsden *v.* Buchanan, 89.  
     *v.* Gordon, 147.  
 Lundin *v.* Hamilton, 202.  
 Lundy *v.* L. Sinclair, 521.  
 Lynedoch, L., *v.* Ochterlony, 567.  
 Lyall *v.* Cooper, 131.  
 Lyle *v.* Lyle, 645.  
  
 Mabens *v.* Ormiston, 276.  
 M'Alister *v.* D. of Argyle, 237.  
     *Trs. v.* M'Alister, 247.  
 M'Andrew *v.* Reid, 222.  
 M'Arthur *v.* Linton, 20.  
     *v.* Simpson, 193.  
 M'Aslan *v.* Glen, 327.  
 M'Aulay *v.* Gault, 441.  
 M'Bayne *v.* Davidson, 624.  
 M'Bean *v.* Young, 122.  
 M'Callum *v.* M'Callum, 78.  
 M'Caw *v.* M'Caw, 529.  
 M'Cowan *v.* Wright, 597.  
 M'Donald, 623.  
     *v.* Thomson, 229.  
     *v.* Jackson, 459.  
     *v.* Jardine, 201.  
     *v.* Stewart, 356.  
 M'Dougal *v.* Foyer, 356, 364.  
     *v.* M'Dougal, 467, 474.  
 M'Dowall *v.* Hamilton, 214.  
     *v.* M'Dowall, 498.  
 M'Ewen & Co. *v.* Smith, 374.  
 M'Farlane *v.* M'Nee, 588.  
 M'Garth *v.* Bathgate, 681.  
 M'Gibbon *v.* M'Gibbon, 97, 568.  
 M'Gillivray *v.* M'Arthur, 361.  
 M'Gowan *v.* Marshall, 363.  
 M'Harg, 197.  
 M'Indoe *v.* Frame, 465.  
 M'Intyre, 76.  
     *v.* Masterton, 156.  
     *v.* M'Nab's *Trs.*, 201.  
     *v.* M'Raild, 308.  
  
 M'Iver *v.* M'Iver, 108.  
 M'Kinlay *v.* M'Kinlay, 455.  
 M'Lachlan *v.* Bennet, 527.  
 M'Laren *v.* Clyde *Trs.*, 55.  
     *v.* Menzies, 313.  
 M'Lean *v.* Russell, Macnee & Co., 402.  
 M'Leiah *v.* Rennie, 245.  
 M'Leod *v.* M'Kenzie, 568.  
     *v.* Tosh, 338.  
     *v.* Urquhart, 192.  
 M'Lure *v.* Baird, 269.  
 M'Lurg *v.* Blackwood, 434.  
 M'Millan *v.* Campbell, 568.  
 M'Naughton *v.* M'Naughton, 379.  
     *v.* Caledonian Rail. Co., 404, 405.  
 M'Nee *v.* Balmanno, 423.  
 M'Neight *v.* Lockhart, 478.  
 M'Neil *v.* Wallace, 403.  
     *Crs. v.* Sadler, 278.  
 M'Neill *v.* Murchy, 45.  
     *v.* Rorison, 410.  
     *v.* Mackenzie, 234.  
 M'Niven *v.* M'Kinnon, 15.  
     *v.* Peffers, 340.  
 M'Pherson *v.* Christie, 301.  
     *v.* Sutherland, 335.  
 M'Quaker *v.* Phoenix Assur. Co., 328.  
 M'Rankin *v.* Schaw, 460.  
 M'Taggart *v.* Jeffrey, 425.  
     *Reprs. v.* Watson, 358.  
 M'Target *v.* M'Target, 547.  
 M'Turk *v.* Greig, 595.  
 M'Whirter *v.* Guthrie, 337.  
 M'William *v.* Adams, 114.  
 Macandrew *v.* Hunter, 456.  
 Macaul, *Crs. of, v.* Ramsay, 342.  
 Macaulay *v.* Conston, 284.  
 Macbean *v.* Wright, 620.  
 Macbrae *v.* MacLaine, 95.  
 Macbrair *v.* Robertson, 619.  
 Macculloch *v.* Marshall, 273.  
     *v.* Maitland, 244.  
 Macdermeit, Children of, *v.* Mont-  
     gomery, 57.  
 Macdonald *v.* Farquharson, 186.  
     *v.* Lockhart, 486.  
     *v.* Macdonald, 115.  
     *v.* Place, 156.  
 Macdonell *v.* D. Gordon, 451, 453.  
 Macdoul *v.* Agnew, 429.  
 Macdonall *v.* C. Dalhousie, 80.  
 Macdougall *v.* Aitken, 69.  
     *v.* Macdougall, 244.  
     *v.* M'Culloch, 240.  
 Macfarlane *v.* Cowie, 444.  
     *v.* Fisher, 555.  
     *v.* Hume, 109.  
     *v.* Monklands Ry. Co., 55.  
     *v.* Robb & Co., 603.  
 Macghie *v.* Livingston, 272.  
 Macgregor, Callum, 684.  
 Macgregor *v.* Forrester, 493.

- Macgregor v. Gordon, 486.  
 Mackay v. Brodie, 123.  
     v. Campbell's Trs., 502.  
     v. Mackay, 108.  
     v. Robertson, 134.  
     v. Sinclair, 510.  
 Mackellar v. Marquis, 492.  
     v. D. of Sutherland, 410.  
 Mackenzie, 89.  
 Mackenzie, 230.  
 Mackenzie, 548.  
     v. Cockburn's Crs., 228.  
     v. Ewing, 68.  
     v. Fairholm, 85.  
     v. L. Lovat, 155.  
     v. Mackenzie, 101.  
     v. Mackenzie, 171.  
     v. Mackenzie, 296.  
     v. Mackenzie, 482.  
     v. Mackenzie, 483.  
     v. Rose, 186.  
     v. Stewart, 24.  
     v. Tuach, 442.  
     Sir R., v. Monro, 580.  
 Mackie v. Malsters of Falkirk, 237.  
     v. Stewart, 468.  
 Mackinnon v. Nanson & Co., 439.  
 Mackintosh, 630.  
     v. H.M. Adv., 12.  
     v. Mackintosh, 299, 401, 492, 507.  
     v. Munro, 205, 504.  
     v. Tytler, 170.  
 MacLagan's Trs. v. MacLagan, 604.  
 MacLaine v. MacLaine, 153.  
 MacLarens v. Bisset, 430.  
 Maclean v. Fyfe, 379, 382.  
 Maclellan, Crs. of, 155.  
     v. Musket, 267.  
 Macleay, petr., 642.  
 MacLure v. Brown, 428.  
 Macmath v. Baron of Broughton, 99.  
 Macmillan, 55.  
 Macnair v. Gray & Woodrop, 328.  
 Macneill v. Macneal, 468.  
 Macombie v. Duguid, 176.  
 Maconochie v. Greenlees, 499.  
 Macpherson v. Mackintosh, 236.  
 Macqueen v. Stirling, 447, 449.  
 Macrae v. Macrae, 179.  
 Macreadie v. Macfadzean's Exrs., 501.  
 Macrorie v. M'Whirter, 190.  
 Mactavish v. M'Lauchlan, 193.  
 Macvicar, 665.  
     v. Cochrane, 166.  
 Macwhirter v. Miller, 546.  
 Madden v. Currie's Trs., 493.  
 Maiklam v. M'Gruther, 327.  
 Mair v. Stewart, 579.  
     v. Walls, 602.  
 Mair and Sons v. Thoms, &c., 327.  
 Maitland v. Brand, 170.  
 Malloch, petr., 641.  
 Man v. Campbell, 626.  
 Mansfield v. Stewart, 106.  
     v. Wright, 122.  
     v. Walker's Trs., 605.  
 Manuel v. Manuel, 97.  
 March, E., v. Kennedy, 486.  
     Earl of, v. Leishman, 264.  
 Marchbanks v. Brockie, 534.  
 Marjoribanks, 93.  
     Crs. v. Marjoribanks, 495.  
 Marischal, E. of, v. Peterhead, 57.  
 Marischal, E., v. Bray, 430.  
 Marr v. Buchanan, 343.  
 Mar, E. of, v. Fraser, 166.  
 Marshall v. E. & G. Ry. Co., 644.  
     v. Marshall, 340.  
     v. Nimmo, 442.  
     v. Reid, 201.  
 Martin v. Agnew, 132, 539.  
     v. Paterson, 155.  
 Mason v. Pritchard, 400.  
 Matthew v. Scott, 533.  
     v. Sibbald, 72.  
 Maule v. Maule, 296, 444, 467.  
 Maxwell, Rob., 668.  
 Maxwell v. Copland, 191.  
     v. Coll. of Glasgow, 260.  
     v. Earl of Nithsdale, 360.  
     v. Lord Lochinvar, 178.  
     Welsh v. Maxwell Welsh, 475.  
     v. Maxwell, 489.  
     v. Maxwell, 529.  
     v. Neilson, 526.  
     v. M'Culloch, 427.  
     v. M'Murray, 200.  
     v. Scott, 250.  
     v. Smith, 484, 487.  
     v. Stevenson, 127.  
     L., v. Stott, 238.  
     v. Wardroper, 303.  
     v. Wylie, 533.  
     Crs. v. Heron, 361.  
 Mein v. Bogle, 331.  
     v. M'Call, 545.  
     v. Taylor, 492.  
 Meldrum's Exrs. v. Meldrum, 550.  
 Melrose, E. of, v. Ker, 149.  
     v. Hastie, 331.  
 Melvil, L., v. Bruce, 170.  
 Melville v. Wemyss, 148.  
 Menzies' Crs., 277.  
     v. Kennedy, 178.  
     v. Menzies, 129.  
     v. Murdoch, 527.  
 Mercer v. Ogilvie, 606.  
     v. Scotland, 502.  
 Merchant Banking Co. of London v. Phoenix Bessemer Steel Co., 325.  
 Merle v. Wells, 400.  
 Meuse v. Craig's Exrs., 135.  
 Middleton v. Rutherglen, 555.

- Miles v. Commrs. of Leith Docks, 113.  
     v. North British Ry. Co., 286.  
 Mill v. Hoare, 441.  
     v. L. Powfoulis, 214.  
 Mills v. Ball, 374.  
 Millar v. Crawford, 11.  
     v. Dickson, 468.  
     v. Tremamondo, 627.  
     v. Mair, 330.  
     v. M'Callum, 9.  
     v. Storie, 453.  
 Miller v. Milne's Trs., 71.  
     v. Blair, 187.  
     v. Douglas, 338.  
     v. Learmonth, 73, 368.  
     v. Marsh, 525.  
     v. Miller's Trs., 479.  
     v. Mitchell, 346.  
     v. Oliphant, 555.  
 Miller and Paterson v. M'Nair, 431.  
 Milligan v. Barnhill, 352.  
     v. Glen, 361.  
     v. Wedderburn, 51.  
 Miln v. Nicolson's Crs., 268.  
 Milne, 631.  
     v. Henderson and Smith, 120.  
     v. Smith, 187.  
 Milne & Co. v. Miller, 332.  
 Milton, Lady, v. Milton, 629.  
 Mirrie v. Pollock, 362.  
     v. Pollocks, 247.  
 Mitchell (of Stow), 444.  
 Mitchell v. Crasweller, 364.  
     v. Mitchell, 545.  
     v. Rodger, 603.  
 Mitchelson v. Atkinson, 487.  
 Moffat v. Moffat, 624.  
     v. Robertson, 561.  
     v. Sheddan, 379, 380.  
 Moir v. Mudie, 129.  
 Molle v. Riddell, 473.  
 Monboddo, Lady, v. Halliburton, 155.  
 Moncrieff v. Miln, 136.  
     v. Moncrieff, 365.  
     v. Moncrieff's Crs., 494.  
     v. Monipenny, 537.  
     v. Ross, 117.  
     v. Tenants of Newton, 243.  
     v. Waugh, 427, 464.  
 Monroe v. Coutts, 532.  
     v. Gordon, 269.  
     v. Graham, 287.  
     v. Mackenzie, 280.  
 Monteith v. Her. of Abbotakerse, 638.  
     v. Anderson, 521.  
     v. Cross, 415.  
     v. Hope, 49.  
     v. Monteith, 246.  
     v. Pattison, 461.  
     v. Robb, 61.  
 Montgomerie v. Boswell, 518, 522, 552.  
     v. E. of Eglinton, 485.  
 Montgomerie v. Wauchope, 92, 367.  
 Montgomery v. Dalrymple, 154.  
     v. Montgomery, 437.  
     v. Earl Wemyss, 488.  
 Montrose, Duke of, v. M'Intyre, 188.  
 Montrose, E. of, v. Scott, 330.  
 Montrose, Mags. of, v. Scott, 54.  
 Moone's Trs. v. Carmichael, 426.  
 Moor v. Belches, 51.  
 More v. Ferguson, 520.  
     v. Stirling & Sons, 441.  
 Moreham, Minister of, v. Binston, 52.  
 Morgan v. Vale of Neath Rail. Co., 405.  
 Morrice v. Monro, 622.  
 Moroney & Co. v. Muir & Sons, 577.  
 Morris v. Allan, 202.  
     v. Beveridge, 523.  
     v. Mackean, 234, 239.  
     v. Riddick, 369, 370.  
     v. Tennant, 492, 526.  
 Morrison v. M'Lean's Trs., 314.  
     v. Cameron, 595.  
     v. Massa, 20.  
     v. Miller, 560.  
     v. Rennie, 565.  
 Mortimer v. Hamilton, 383.  
 Morton v. Graham, 200.  
     v. Young, 90.  
 Morton & Co. v. Abercromby & Co.,  
     375, 377.  
 Moutray v. Hope, 468.  
 Mowat v. Banks, 463.  
 Mowbray v. Arbuthnot, 164.  
     v. Scougall, 534.  
 Moyes v. Whinney, 11.  
 Muir v. City of Glasgow Bank, 562.  
     v. Collett, 18.  
     v. Milligan, 84.  
     v. Muir, 220.  
     v. Wilson, 195.  
 Muir & Thomson v. Kincaid, 571.  
 Muirhead v. Muirhead's Factor, 65.  
 Munnoch, 94.  
 Munro v. Graham, 112.  
     v. Munro, 80.  
 Murdoch v. Moir, 190.  
     v. Fullerton, 200.  
 Mure v. Mure, 486.  
     v. L. Lyon, 303.  
 Murray v. Brownhill, 232.  
     v. Chalmers, 97.  
     v. Fleming, 485.  
     v. Graham, 70.  
     v. Intromitters, 263.  
     v. Kelly, 266.  
     v. Murray, 625.  
     v. Neilson, 432.  
     v. Mags. of Peebles, 234.  
     v. Rutherford's Exrs., 534.  
     v. Scott, 55.  
     v. Trotter, 459.  
 Murray, Earl. v. Lord Grant, 220.

- Murray's Exrs. v. Murray, 546.  
 Myles v. Calman, 493.  
 Nairn v. Brown, 446.  
 Napier v. Carson, 316.  
     v. Dick, 378.  
     v. Elphinston, 315.  
     v. Ferrier, 199.  
     v. Livingston, 486.  
     v. Campbell, 466.  
 Nasmyth v. Jaffray, 138.  
 National Bank v. Forbes, 437.  
 National Exch. Co. v. Drew, 345, 394.  
 Naysmith v. Storey, 161.  
 Neil v. Tait, 388.  
 Neilson v. Arthur, 70.  
     v. Cochrane's Reprs., 458.  
     v. Murray, 218.  
     v. Ross, 581.  
     v. Vallance, 586.  
 Nelson v. Salvador, 415.  
 Nerot v. Burnand, 340.  
 Newland v. Newland's Cra., 492.  
 Newliston, L., v. Inglis, 236.  
 Newton v. Thomson, 534.  
 Newton & Co. v. Collogan & Co., 317.  
 Nicolson v. Houston, 504, 505.  
     v. Mounsey, 408.  
     v. Ramsay, 496.  
 Nimmo v. Brown, 358.  
     v. Murray's Trs., 529, 531.  
 Nisbet v. Aikman, 203.  
     v. Baillie, 459.  
     v. Dickson & Co., 402.  
     v. Moncrieff, 482.  
     v. Rennie, 65.  
     v. Robertson, 186.  
 Nisbett v. Nisbett's Trs., 244.  
 Nithsdale, E., v. L. Westraw, 167.  
 Norie v. Porterfield, 461.  
 Normant v. Wilson, 9.  
 North Brit. Rail. v. Barr & Co., 645.  
 Norval v. Hunter, 620.  
 Oakley v. Telfer, 98.  
 Ochterlony v. Com. Agt. of Carmyle,  
     263.  
 Ochtertyre's Cra., 287.  
 O'Connell v. Russell, 307.  
 Officers of State v. Alexander, 470.  
     v. Christie, 188.  
     v. Gordon, 47.  
     v. Stewart, 263.  
 Ogilvie v. Baillie, 316.  
     v. Dundas, 503.  
     v. Erskine, 473.  
     v. Mercer, 143.  
     v. Mollyson, 41.  
     v. Moss, 317, 319.  
     v. Scott, 410.  
 Ogilvies v. Turnbull, 155.  
 Ogilvy v. Ogilvy, 511.  
 Ogilvy v. Ogilvy's Trs., 514.  
 Oldaker v. Goldney, 82.  
 Old Machar, Minister of, 257.  
 Oliphant v. Douglas, 308.  
     v. Oliphant, 532.  
 Oliver v. Grieve, 383.  
     v. Smith, 19.  
     v. Smith, 565.  
 Orr v. Watson, 520.  
 Orme v. Diffors, 71, 602.  
 Ormiston v. Broad, 528.  
     v. Hill, 278.  
 Ormrod v. Huth, 333.  
 Oswald v. Robb, 192.  
     v. City of Glasgow Bank, 566.  
 Oswald's Trs. v. Dickson, 391.  
 Padgett v. M'Nair, 334.  
 Pagan v. Wyllie, 319.  
 Palmer v. Russell, 120.  
     v. Sinclair, 76.  
 Panmure v. Crokat, 539.  
     v. Halket, 54.  
     v. Presbytery of Brechin, 54.  
 Park v. Dalrymple, 628.  
     v. Maxwell, 56.  
 Parks v. Gould & Co., 399.  
 Parkinson v. Lee, 333.  
 Parrot v. Fraser, 90.  
 Pasley v. Freeman, 383.  
 Paterson, 423.  
 Paterson, 651.  
     v. Anderson, 661.  
     v. Bonar, 356.  
     v. Calder, 397.  
     v. Edington, 378.  
     v. Grant, 341.  
     v. Johnston, 630.  
     v. Just, 8.  
     v. Kilgour, 624, 625.  
     v. Macqueen, 307.  
     v. Moncrieff, 350.  
     v. Murray, 274.  
     v. Paterson, 69.  
     v. Pollock, 102.  
     v. Ramsay, 40.  
     v. Smith, 249.  
     v. Spreuls, 534.  
 Pattinson v. Robertson, 621.  
 Pattison v. Dunn's Trs., 524, 526.  
 Paton, 434.  
     v. Carruthers, 346.  
     v. Drysdale, 454, 470.  
 Patrick v. Watt, 426.  
 Paul v. Anstruther, 250.  
     v. Heritors of Banchory Devenick,  
         259.  
     v. Laing, 625.  
     v. Reid, 454.  
 Peacock v. Glen, 515.  
     v. Peacock, 340.  
 Pedie v. Pedies, 478.

- Peebles *v.* Watson, 213.  
 Pender, &c., *v.* Hamilton, 338.  
 Penhallow *v.* Mersey Docks and Harbour Board, &c., 408.  
 Penman, 9.  
     *v.* Brown, 553.  
 Pennycook *v.* Grinton, 61.  
 Perston *v.* Perston's Trs., 90, 562.  
 Perth, Earl of, 572.  
 Peterkin *v.* Earl Moray, 259.  
 Petrie *v.* Meek, 114.  
 Petry *v.* Paul, 76.  
 Phillips *v.* Earl of Rothes, 486.  
 Phillips *v.* Innes, 381.  
 Pigott *v.* Colville, 211.  
 Pirie *v.* Warden, 17.  
 Pitt *v.* Pitt, 82.  
 Pitmedden, Lord, *v.* Patersons, 440.  
 Pitfodds, Lady, *v.* L. Pitfodds, 575.  
 Pollock *v.* Storie, 221.  
     *v.* Univ. of Glasgow, 638.  
 Pollock, Cred. of, *v.* Pollock, 580.  
 Pollock, Gilmour, & Co. *v.* Harvey, 193.  
     *v.* Paterson, 346.  
 Polwarth, L., &c., *v.* E. Home, 352.  
 Pool *v.* Irving, 642.  
 Porteous *v.* Blair, 117.  
 Porterfield *v.* Corbet, 523.  
 Pratt *v.* Abercromby, 190, 191.  
 Preston *v.* E. of Dundonald's Crs., 157.  
     *v.* Gregor, 206.  
     *v.* Heirs of Entail of Valleyfield, 484.  
 Preston, Lady, *v.* L. Preston, 247.  
 Pride *v.* Thomson, 519.  
 Priestly *v.* Fernie, 347.  
 Primrose *v.* Primrose, 486.  
 Pringle *v.* Ker, 100.  
     *v.* Ker & Home, 99.  
     *v.* MacLagan, 196.  
     *v.* Pringle, 368.  
     *v.* Pringle, 525.  
 Pringle's Trs. *v.* Hamilton, 65.  
 Proudfoot *v.* Montefiori, 345.  
 Purdon *v.* Rowatt's Trs. 426.  
 Purdy *v.* L. Torphichen, 452.  
 Purves *v.* Keith, 142.  
     *v.* Landel, 18.  
 Purvis' Trs. *v.* Purvis' Exrs., 310, 326.  
  
 Queensberry's, Duke of, Reprs., *v.* Duke of Buccleuch, 488.  
     Duke of, *v.* Barker, 205.  
     Exrs., Duke of, *v.* Tait, 278.  
 Queensberry, Earl of, *v.* Duke of Buccleuch, 302.  
     *v.* Queensberry's Exrs., 248.  
     *v.* Duke of Stormonth, 187.  
 Queensberry, Marquis of, *v.* Scottish Union Insurance Co., 421.  
  
 Rabone *v.* Williams, 346.  
 Rae *v.* Finlayson, 193.  
 Raeburn *v.* Reid, 380.  
 Ragg *v.* Brown, 367.  
 Raleigh *v.* Hughson & Dobson, 391.  
 Ralston *v.* Leitch, 242, 247.  
 Ramsay, Bonars & Co. *v.* Mackersay, 343.  
 Ramsay *v.* Brownlie, 66, 276, 277.  
     *v.* Gowdie, 571.  
     *v.* Maule, 327.  
     *v.* Ramsay, 501.  
     *v.* Duke of Roxburgh, 187.  
 Randall *v.* Johnston, 584.  
 Rankin *v.* Arnot, 227.  
 Rankine *v.* Murray, 399.  
     *v.* Reid, 532.  
 Ransan *v.* Mitchell, 384.  
 Redfern *v.* Maxwell, 242.  
 Redhead *v.* Midland Railway Co., 407.  
     *v.* Kerr, 191.  
 Reddie *v.* L. & N. W. Railway Co., 402.  
 Reid, 56.  
 Reid, 649.  
 Reid, &c., *petrs.*, 4.  
     *v.* Bartonshill Coal Co., 403.  
     *v.* Baxter, 312.  
     *v.* Berkley, 90.  
     *v.* Crawford, 381.  
     *v.* Finlaysons, 40.  
     *v.* Melvil, 263.  
     *v.* Moir, 115.  
     *v.* Royal Exchange Insur. Co., 419.  
     *v.* Scot, 308.  
 Reids *v.* Campbell, 138.  
 Rennie *v.* Ritchie, 433.  
 Renton *v.* Anstruther, 216, 217, 486.  
     *v.* Girvan, 568.  
     *v.* Renton, 553.  
     L., *v.* L. Wedderburn, 180.  
 Reoch *v.* Robb, 94.  
 Rhind *v.* Commercial Bank, 620.  
 Rhind's Trs., 502.  
 Richan *v.* Hill, 521.  
 Richardson *v.* Cope, 534.  
     *v.* Donaldson's Trs., 534.  
     *v.* Livingston, 506.  
     *v.* Richmond, Duke of, *v.* Earl of Seafield, 187.  
 Riddel *v.* White, 146.  
 Riddell *v.* Dalton, 586.  
     *v.* Zinzan, 202.  
 Riddells *v.* Scott, 491.  
 Ridpath *v.* White, 192.  
 Ringer *v.* Churchills, 82.  
 Ritchie *v.* Mackay, 621.  
     *v.* Fraser, 15.  
     *v.* Little, 456.  
 Roberts *v.* Potters, 268.  
     *v.* City of Glasgow Bank, 564.  
 Robertson (A. *v.* B.), 104.  
 Robertson, 491.

- Robertson v. Burdekin, 320.  
 r. Davidson, 344.  
 r. Gow, 330.  
 r. Gray, 105.  
 r. Handynde, 580.  
 r. M'Glashan, 324.  
 r. M'Kenzie, 501.  
 r. Moderator of Gen. Assembly, 76.  
 r. Ogilvy's Tra., 531.  
 r. Ramsay, 328.  
 r. Robertson, 370, 544.  
 r. Robertson, 666.  
 r. Seton, 135.  
 r. Udnies & Patullo, 306.  
 r. White, 630.  
 Robertsons, petra., 109.  
 Robin v. Drummond, 170.  
 Robinson, 634.  
 r. Middleton, 344.  
 r. Murdoch, 563.  
 r. Rae, 628.  
 r. Smith, 389.  
 Robson v. Bywater, 464.  
 Rochead v. Moodie, 196.  
 Rodgers v. Harvie, 230.  
 Rogerson v. Barker, 547.  
 Rogers' Tra. v. Scott, 247.  
 Rollo v. Houston's Tra., 241.  
 r. Rollo, 484.  
 Rose v. Fraser, 243.  
 r. Ramsay, 185.  
 Rosebery v. Cra. of Primrose, 511.  
 Rosehill v. Thomson's Cra., 266.  
 Roslin, Lord, v. Fairbairn, 504.  
 Ross v. Allan, 562.  
 r. Baird, 121.  
 r. Craigie, 460.  
 r. King, 492.  
 r. Lindsay & Adam, 399.  
 r. Matheson, 316.  
 r. M'Leod, 61.  
 r. Munro, 80.  
 r. Renton, 441.  
 r. Ross, 135.  
 r. Ross, 224.  
 r. Ross's Tra., 136.  
 r. M. of Salton, 457.  
 r. C. Sutherland, 194.  
 Rossmore's Tra. v. Brownlie, 184.  
 Rosetter v. Cahlmann, 330.  
 Routledge v. Carruthers, 499.  
 Roux v. Salvador, 416.  
 Rowallan, Lord, v. Boyd, 204.  
 Rowand v. Campbell, 213.  
 r. Freeman, 363.  
 r. Stevenson, 213.  
 Rowe v. Pickford, 373.  
 Roxburghe, Duke of, v. Duchess of  
 Roxburghe, 244.  
 r. Wauchope, 483, 526.  
 Royal Bank v. Bank of Scotland, 266.  
 v. Gardyne, 160.  
 Royal Infirmary v. Lord Advocate, 531.  
 Rugg v. Minett, 332.  
 Rule v. Lord Billie, 179.  
 v. Magistrates of Stirling, 467.  
 Russell v. Earl of Breadalbane, 437.  
 r. Freen, 192.  
 r. Macnab, 391.  
 r. Mudie, 146.  
 r. Russell, 488, 522.  
 Rutherford v. Nisbet's Tra., 516.  
 Ryder v. Cra. of Ross, 277.  
 Rymer v. M'Intyre, 388.  
 Salkeld v. Johnson, 8.  
 Salmon v. Orr's Exrs., 547.  
 v. Padon, 391.  
 Sanders v. Beveridge, 563.  
 r. Dunlop, 73.  
 Sandilands v. Earl of Haddington, 148.  
 r. Marsh, 338.  
 Sawers v. Balmarnie, 629.  
 Schaw v. Schaw, 483.  
 Schotsmans v. Lancashire and York-  
 shire Railway Co., 373, 378.  
 Schuurmans v. Stephen, 330.  
 & Sons v. Goldie, 377.  
 Schweizer, 44.  
 Scot v. Buccleuch, 137.  
 Cra. of, v. Ker, 76.  
 r. Langtoun, 180.  
 r. Montgomery, 552.  
 r. Somervail, 302.  
 r. Strachan, 94.  
 Scott v. Affleck, 518.  
 v. Ancrum Heritors, 264.  
 r. L. Belhaven, 551.  
 of Blair's Cra. v. Charters, 606.  
 v. Coutts, 267.  
 v. Edmond, 147.  
 v. Fisher, 504.  
 v. Archbishop of Glasgow, 145.  
 v. College of Glasgow, 263.  
 r. Hall & Bisset, 391.  
 v. Kennedy, 87.  
 r. Methuen, 253.  
 v. Miller, 555.  
 v. Price, 448.  
 v. Riddell, 13.  
 v. Rutherford, 461.  
 r. Scales, 532.  
 r. Scott, 95.  
 r. Scott, 370.  
 r. Scott, 484.  
 v. Scott's Cra., 488.  
 v. Selbie, 302.  
 Scottish N. E. Rail. Co., v. Gardiner,  
 55.  
 v. Napier, 429.  
 Scottish Prov. Assur. Co. v. Pringle,  
 356.  
 Scougal v. Gilchrist, 329.  
 Scouller v. Pollock, 234.

- Scrabster Harbour *Tra. v. Sinclair*, 188.  
 Scrimgeour *v. Wedderburn*, 92.  
 Seaton, 509.  
 Selkirk, E., *v. Officers of State*, 260.  
 Selkirk, Magr. of, *v. Clapperton*, 142.  
 Semple *v. M'Nish & Dobie*, 547.  
 Senior *v. Ward*, 405.  
 Service *v. Chalmers*, 21.  
 Seth *v. Hain*, 555.  
 Seton, 327.  
     *v. Dawson*, 561.  
 Shand, 69.  
     *v. Blaikie*, 422.  
     *v. Shand*, 74.  
 Shanks *v. Kirk-Session of Ceres*, 144.  
     *v. Thomson*, 442.  
 Shaw *v. Buchanan*, 20.  
     *v. Donaldson*, 335.  
     *v. Calder Oil Co.*, 401.  
 Sharp *v. Crichton*, 90.  
     *v. Harvey*, 462.  
     *v. Sharp*, 483.  
 Shedden *v. Gibson*, 76.  
     *v. Patrick*, 98.  
 Shepherd *v. Grant's Trs.*, 454.  
 Sheriff *v. Ferguson*, 229.  
 Sibbald *v. Lethentie*, 179.  
 Simpson *v. Brown*, 463.  
     *v. Allan*, 117.  
     *v. Barr*, 553.  
     *v. Earl of Home*, 489.  
     *v. Fleming*, 356.  
     *v. Strachan*, 328.  
 Simson *v. Gray*, 196.  
 Sinclair *v. Breadalbane*, 148.  
     *v. Brown*, 86.  
     *v. Magistrates of Dysart*, 280.  
     *v. Sinclair*, 523.  
     *v. Sinclair*, 623.  
     *v. Sinclair*, 626.  
 Sinclair's Exrs. *v. Fraser*, 503.  
     *v. Murray*, 326.  
     *v. Sinclairs*, 487.  
     *v. Smith*, 17.  
     *v. Stark*, 86.  
     *v. Wilson & M'Lellan*, 351.  
 Sivwright *v. Wilson*, 240.  
 Skene *v. Forbes*, 481.  
     *v. Greenhill*, 195.  
 Sleyth *v. Wilson*, 384.  
 Slowey *v. Robertson*, 202.  
 Slubey & Smith *v. Heyward & Co.*, 376.  
 Small *v. Miller*, 160.  
 Smart *v. Gairns*, 389.  
 Smeiton *v. Kinninmond*, 361.  
 Smellie *v. Lockhart*, 124.  
 Smith *v. Bank of Scotland*, 357, 358.  
     *v. Bank of Scotland*, 314.  
     *v. Barlas*, 298.  
     *v. Campbell*, 648.  
     *v. Dick*, 107.  
     *v. Drummond*, 521.  
     *v. Earl of Moray*, 442.  
     *v. Frier*, 65, 271.  
     *v. Harris*, 291.  
     *v. Kerr*, 65.  
     *v. Macgill*, 191.  
     *v. Mullett*, 323.  
     *v. Officers of State*, 257, 260.  
     *v. Stoddard*, 69.  
     *v. Thomas*, 545.  
     *v. Smith*, 69.  
     *Tra. v. Grant*, 542.  
     *Cra. of, v. Smiths*, 155.  
 Smiths *v. Aikmans*, 431.  
 Smiton *v. Miller*, 362.  
 Smitton *v. Tod*, 568.  
 Smollett *v. Buntein*, 8.  
 Smout *v. Ilberry*, 346.  
 Snee *v. Anderson's Trs.*, 583.  
 Snodgrass *v. Beat's Cra.*, 583.  
     *v. Buchanan*, 473, 485.  
 Snow *v. Hamilton*, 54.  
 Soames *v. Sugrue*, 418.  
 Solicitor of Tithes *v. Earl of Fife*, 264.  
 Solomons *v. Nissen*, 375.  
 Somervell *v. Gordin*, 165.  
 Sommervell *v. Muirhead's Exrs.*, 456, 457.  
 Sommerville *v. Redfearn*, 438.  
 Southack, E., *v. Melgum*, 239.  
     *v. Reddy*, 459.  
 Spain *v. Arnot*, 380.  
 Spark *v. Barclay*, 505.  
 Speid *v. Speid*, 484, 487.  
 Spence *v. Ormiston*, 332.  
 Spencer, Sutherland, & Co. *v. Hay*, 190.  
 Spey, Heritors of, 145.  
 Speir *v. Dunlop*, 603, 604.  
 Speirs *v. Royal Bank*, 398.  
     *v. Speirs*, 136.  
 Spottiswoode *v. Seymer*, 148.  
 St. Andrews, United College of, *v. Blyth*, 580.  
 Stalker *v. Carmichael*, 308.  
     *v. Aiton*, 442.  
 Stark, 431.  
     *v. Thumb*, 645.  
     *v. Jelly*, 552.  
 Steedman *v. Horne & Young*, 237.  
 Steele *v. Wemyss*, 325.  
 Steil *v. L. Orbiston*, 438.  
 Stein's Assig. *v. Brunton*, 357.  
 Stein *v. Hutcheson*, 377.  
 Stenhouse *v. Innes*, 156.  
 Steuart *v. Hay*, 437.  
     *v. Parochial Board of Keith*, 112.  
 Steven *v. Boyd*, 92.  
     *v. Scott*, 603.  
 Stevenson *v. Allans*, 96.  
     *v. Duncan*, 432.  
     *v. Kyle*, 455.  
     *v. Young*, 644.  
 Stevensons *v. Paul*, 445.

- Stewart, 31.  
     *r. Aberbadnoch Feuars*, 241.  
     *r. Baillie*, 350.  
     *r. Blackwood*, 233.  
     *r. Caithness*, 231.  
     *r. Campbell*, 247.  
     *r. Coldingham Feuara*, 154.  
     *r. Dundas' Cra.*, 441.  
     *r. Fullerton*, 485, 494.  
     *r. Gedd*, 363.  
     *r. Greenock Marine Assur. Co.*,  
         417, 418.  
     *r. Hay*, 104.  
     *r. Henderson*, 84, 87.  
     *r. West India, &c., Steamship Co.*,  
         354.  
     *r. Kirkcaldy*, 558.  
     *r. Lindsay*, 284.  
     *r. M'Callum*, 148.  
     *r. M'Keand*, 107.  
     *r. Mackenzie*, 353.  
     *r. Duke of Montrose*, 146, 147.  
     *r. Neilson*, 526.  
     *r. Nicolson*, 477.  
     *r. Porterfield*, 485.  
     *r. Scott*, 401.  
     *r. Smart*, 231.  
     *r. Snodgrass*, 97.  
     *r. Sprewl*, 103.  
     *r. Stewart*, 108.  
     *r. Feuars of Tillicoultry*, 353.  
     *r. Watson*, 166.  
     *r. Wilkins*, 333.  
 Stuart, 69.  
     *r. E. Bute*, 595.  
     *r. Haliburton*, 666.  
     *r. M'Barnet*, 187.  
 Sturrock *v. Smith or Carruthers*, 185.  
 Stirling *v. An. Renters of Ballagan*, 281.  
     *r. Dunn*, 205.  
     *r. Ewart*, 210.  
     *r. Langa*, 464.  
     *r. Earl of Lauderdale*, 351.  
     *Maga. of, r. Gordon*, 48.  
 Stockdale *v. Hansard*, 402.  
 Stoddart *v. Rutherford*, 87.  
 Stoppel *v. Stoddart*, 377, 378.  
 Stormont *v. Annandale's Cra.*, 484.  
     *r. Robertson*, 224.  
 Strachan *v. M'Dougle*, 441.  
     *Heirs of, r. Creditors*, 510.  
 Straiton *v. Bell*, 280.  
 Stratton, 335.  
 Street *v. Masson & L. Torphichen*, 580.  
 Strowan *v. Cameron*, 42.  
 Struthers *v. Barr*, 337.  
 Summers *v. Simson*, 505.  
 Sutherland *v. Sinclair*, 144.  
     *Countess of, r. Cra. of Skelbo*, 180.  
     *Duke of, r. Ross*, 187.  
 Suttie *v. Aberdeen Arctic Co.*, 125.  
 Swan *v. Steele*, 338.  
 Swanson *v. Gallie*, 621.  
 Swinburne *v. Western Bank*, 344.  
 Swinton *v. Gray*, 16.  
     *r. Notman*, 93.  
 Sword *v. Blair*, 325.  
     *r. Sinclairs*, 331.  
 Syme *v. Dewar*, 503.  
 Symington *v. Symington*, 265.  
 Tacksman of Customs *v. Greenhead*, 199.  
 Tailfer *v. Hamilton*, 348.  
 Tailors of Aberdeen *v. Coutts*, 166.  
 Tailors of Glasgow *v. Blackie*, 172.  
 Tait *v. Wilson*, 461.  
 Tanner *v. Scovel*, 376.  
 Taylor, 584.  
 Taylor, petr., 557, 559.  
 Taylor *v. L. Braco*, 527.  
     *r. Forbes*, 429.  
 Tench *v. Cheese*, 560.  
 Tener's Trs. *v. Tener's Trs.*, 314.  
 Tait, Bailie of Melrose, *r. Darling*, 621.  
 Thistle Friendly Society of Aberdeen  
     *v. Garden*, 357.  
 Thoirs, Cra. of, *v. Lady Middleton*, 580.  
 Thomson, 119.  
 Thomson, 584.  
     *v. Bank of Scotland*, 358.  
     *v. Carnegie*, 624.  
     *v. Christie*, 562.  
     *v. Elderson*, 288.  
     *v. Harvie*, 205.  
     *v. Heritors of Dunfermline*, 52.  
     *v. James*, 309.  
     *v. Kerr*, 101.  
     *v. Liddell*, 339.  
     *v. M'Crummen's Trs.*, 9.  
     *v. Merston*, 203.  
     *Cra. of, v. Monro*, 548.  
     *v. Mowbray*, 628.  
     *v. Pagan*, 97.  
     *v. Parochial Board of Inveresk*, 112.  
     *v. Paxton*, 199.  
     *v. Shiel*, 312.  
     *v. Smith*, 464, 536.  
     *v. Stephenson*, 391.  
     *v. Stevenson*, 97.  
     *v. Stewart*, 70.  
     *v. Waddell*, 91.  
     *v. Westwood*, 455.  
     *v. Whitehead*, 20.  
     *Cra. of, v. Monro*, 548.  
 Thomson's Trs. *v. Easson*, 314.  
 Thoms *v. Thoms*, 287.  
 Thornhill *v. M'Pherson*, 496.  
 Thorburn *v. Howie*, 362.  
 Till *v. Jamiesons*, 436.  
 Tod's Trs. *v. Wilson*, 436.  
 Tollemache, 81.  
 Tomison *v. Tomison*, 100.  
 Topham *v. Marshall*, 72.  
 Torphichen *v. Gillon*, 49.

- Tortance *v.* Bryson, 547.  
 Torrance or Beattie *v.* Murdoch, 521.  
 Torrie, &c., *v.* D. of Athole, 231.  
 Torrie *v.* King's Remembrancer, 570.  
 Torry-Anderson *v.* Buchanan, 494.  
 Townsend *v.* Crowdy, 351.  
 Trail *v.* Trail, 499.  
 Traill *v.* Dangerfield, 467.  
 Trinity Hospital *v.* Common Agent of  
     South Leith, 264.  
 Trotter *v.* Hume, 581.  
     *v.* Rothead, 249, 537.  
 Tulliallan, Min. of, *v.* Colvill, 262.  
 Tullis *v.* White, 574.  
 Tulloch *v.* Davidson, 395.  
 Tulk *v.* Anderson, 380.  
 Turnbull *v.* Anderson, 33.  
     *v.* Tawse, 568.  
     *v.* Turnbull, 70.  
 Turner *v.* Ross, 626.  
 Turner *v.* Scott, 448.  
 Turner's Trs., 559.  
 Tweeddale *v.* Ayton, 160.  
     *v.* Hume, 426.  
     M. of, *v.* Sommer, 131.  
 Udell *v.* Atherton, 345.  
 Ure *v.* Mitchelson, 107.  
 Urquhart, petr., 84.  
 Urquhart *v.* M'Kenzie, 201.  
     *v.* Officers of State, 291, 313.  
     *v.* Tulloch, 185.  
     *v.* Urquhart, 4.  
 Vans *v.* Mulloch, 317.  
 Veitch *v.* Duncan, 240.  
     *v.* Murray & Co., 400.  
     *v.* Pallat, 177.  
     *v.* Young, 135.  
     *v.* Young, 510.  
 Vere *v.* Dale, 89.  
     *v.* Hyndford, 87.  
 Vernor *v.* Allan, 263.  
 Vezian *v.* Grant, 415.  
 Wade, 663.  
 Waddell *v.* Brown, 193.  
 Waddell *v.* Waddell, 433.  
 Waird *v.* Waird, 506.  
 Walker *v.* Bayne, 198.  
     *v.* Buchanan, Kennedy, & Co., 555.  
     *v.* Flint, 190.  
     *v.* Inglis, 362.  
     *v.* M'Adam, 62.  
     *v.* Masson, 553.  
     *v.* Park, 534.  
     *v.* Presbytery of Arbroath, 122.  
     *v.* Renton, 234.  
     *v.* Somerville, 346.  
     *v.* Walker, 84.  
     *v.* Walker's Crs., 66.  
     *v.* Wishart, 234.  
 Wallace, 111.  
     *v.* Barrie, 321.  
     *v.* Campbell, 461.  
     *v.* Colquhoun, 19.  
     *v.* Davies, 436.  
     *v.* Earl of Eglinton, 170.  
     *v.* Edgar, 434.  
     *v.* Ferguson, 160.  
     *v.* Lees, 464.  
     *v.* Muir, 532, 570.  
     *v.* Portland, 264.  
     *v.* Turnbull, 120.  
     *v.* Wallace, 89.  
     *v.* Wallace's Trs., 482.  
     *v.* Wallaces, 533.  
     & Co. *v.* Miller, 377.  
 Warburton *v.* G. W. Ry. Co., 405.  
 Warden *v.* British Linen Co., 349.  
 Wardlaw *v.* Mackenzie, 578.  
 Wardrop *v.* Fairholm, 442.  
 Wards, L., *v.* L. Balcomy, 149.  
 Warner *v.* Cunningham, 338.  
 Warrender *v.* Warrender, 74, 81.  
 Wason *v.* Walter, 408.  
 Watling *v.* M'Donald, 301.  
 Waters *v.* Taylor, 340.  
 Watkins *v.* Wilkie, 446.  
 Watson *v.* Arbuckle, 303.  
     *v.* Cruickshank, 77.  
     *v.* Cunningham, 429.  
     *v.* Feuars of Dunkennan, 239.  
     *v.* Law, 147.  
     *v.* Monro, 434.  
     *v.* Neuffert, 308.  
     *v.* Rae, 93.  
     *v.* Reid, 448.  
     *v.* Welch, 113.  
     Creds. of, *v.* Cameron, 368.  
 Watsons *v.* Scott, 314.  
 Watt *v.* Blair, 408.  
     *v.* Mitchell, 306.  
 Wauchope *v.* N. B. Ry. Co., 298.  
     *v.* Duke of Roxburghe, 221.  
 Wauchton *v.* L. Innerwick, 365.  
 Webster *v.* Reid's Trs., 592.  
 Wedderburn, L., *v.* Wardlaw, 166.  
 Weatherstone *v.* M. Tweeddale, 52.  
 Weir *v.* Aiton, 188.  
     *v.* Deuchar, 266.  
     *v.* Drummond, 504.  
     *v.* Parkhill, 325.  
     *v.* Falconer, 439.  
 Wellwood *v.* Ross, 561.  
 Wellwood's Trs. *v.* Boswell, 367.  
 Welsh *v.* Welsh, 94.  
     *v.* Barstow, 432.  
 Wemyss *v.* Clark, 465.  
     *v.* Wemyss, 77, 350.  
     *v.* Wilson, 200.  
 Wentworth *v.* Outhwaite, 378.  
 Westraw, L., *v.* Williamstown, 128,  
     436.

Western Bank v. Bairds, 396.  
     r. Buchanan, 562.  
 Weston v. Tailors of Potterrow, 402.  
 Wharcliffe, L., v. Nairne, 484.  
 White, 89.  
 White v. Crockett, 302.  
     r. Hay, 504.  
     r. Moncrieff, 200.  
     r. Murdoch, 619.  
     r. Reid, 181.  
     r. Sibbald, 59.  
     r. Spence, 456.  
     r. Lady Yester, 550.  
 Whitehead v. Tuckett, 344.  
 Whitelaw & Kirk v. Steins, 359.  
 Whitfield v. Le Despencer, 408.  
 Whyte v. Knox, 426.  
 Wight v. Brown, 65.  
     r. E. of Hopetoun, 192.  
 Wigton, Earl, v. Kirkintilloch, 240.  
 Wilde v. Gibson, 345.  
 Wilkie v. Dunlop, 98.  
     r. Simpson, 55.  
 Wilky v. Morrison & Stuart, 67.  
 Williams v. Reynolds, 307.  
 Williamson v. White, 301.  
 Willison v. Agnew, 261.  
     r. Bell & Grant, 131.  
     r. M. Breadalbane, 330.  
     r. Brett, 299.  
     r. Callender, 485.  
     r. Campbell of Ottar, 468.  
     r. Cra. of Dorator, 484.  
     r. Deans, 71.  
     r. Glen, 493.  
     r. Haddo, 644.  
     r. Merry & Cunningham, 405.  
     r. Smart, 543.  
     r. Stirling's Trs., 317.  
     r. Taylor, 553.  
     r. Wilson, 69.  
 Wilson & M'Lellan v. Fleming, 444.  
 Wilson's Trs. v. Pagan, 495, 498.  
     r. Stirling, 317.  
 Winchester v. Smith, 587.  
 Wink v. Mortimer, 346.  
 Wishart, petr., 266.  
 Wishart v. Arthur, 628.  
     r. Ballantynes, 137.

Wishart v. Falconer, 629.  
 Wiseman v. Wiseman, 629.  
 Withers, Birch, & Co. v. Cowan, 342.  
 Wood v. Kello, 620.  
     r. Reid, 580.  
     r. Scott, 285.  
     r. Weir's Cra., 303.  
 Wood, Small, & Co. v. Spence, 555.  
 Wood's Trs. v. White's Trs., 154.  
 Woods, Comra. of, v. Gammell, 187.  
 Woodrop, 405.  
 Woolmet, Children of, v. Douglas, 128.  
 Wordie v. M'Donald, 175.  
 Wotherspoon v. Mags. of Linlithgow,  
     602.  
 Wright v. Anderson, 446.  
     r. Cunningham, 442.  
     v. Din, 630.  
     r. Hamilton, 91.  
     r. Lord Rutherford, 625.  
     r. Sheill, 430.  
     r. Turner, 222.  
     r. Veitch, 60.  
     r. Wright, 319.  
 Wylie v. Lochead, 126.  
 Wyper v. Harveys, 439.  
 Wyse v. Wyse, 463.  
  
 Yeaman v. Grieves, 88.  
 York Buildings Company v. Mackenzie,  
     564.  
 Young v. Arnold, 16.  
     r. Calderwood, 216.  
     r. Carmichael, 189.  
     r. Cuddie, 232.  
     r. Danoch's Trs., 580.  
     r. Dewar, 234.  
     r. Forbes, 323.  
     r. Gordon's Trs., 152.  
     r. Rose, 103.  
     r. Watson & Syme, 95.  
 Young's Trs. v. Ross, 317.  
     r. Young, 614.  
 Yuille v. Scott, 460, 461.  
  
 Zoller, petr., 556.  
 Zetland, Earl of, v. Glover Incorp. of  
     Perth, 215.



THE  
PRINCIPLES  
OF THE  
LAW OF SCOTLAND.

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BOOK I.

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TIT. I.—OF LAWS IN GENERAL.

1. LAW is the command of a Sovereign, containing a Law. common rule of life for his subjects. It is divided into (1-6)  
the law of *Nature*, the law of *Nations*, and *Civil* or *Municipal* law.

2. The LAW OF NATURE is that which GOD, the Sovereign of the Universe, has prescribed to all men, not by any formal promulgation, but by the internal dictate of reason alone. (a) It is discovered by a just consideration of the agreeableness or disagreeableness of human actions to the nature of man; and it comprehends all the duties we owe either to the SUPREME BEING, to ourselves, or to our neighbour—as reverence to GOD, self-defence, temperance, honour to our parents, benevolence to all, a strict adherence to our engagements, gratitude, &c. This law is improperly attri-

Law of Nature. (7)

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(a) Hæc non scripta, sed nata lex; quam non didicimus, accepimus, legimus; verum ex natura ipsa arripimus, hausimus, expressimus; ad quam non docti, sed facti, non instituti, sed imbuti sumus.—Cicero, Pro Milone, c. 4. See Stair, i. 3-7.

buted to the brute part of the creation; for brutes act from necessity, and are not capable of proper obedience, nor consequently of law.

Laws of  
Nations.

(14)

3. The LAW OF NATIONS is also the result of reason, and has GOD for its Author; but it supposes mankind formed into several bodies politic, or states; and it comprises all the duties which one state owes to another. These must of necessity be similar to the duties arising between individuals, since both are dictated by reason, so that what is the law of nature when applied to men, considered simply as such, is indeed the law of nations when applied to kingdoms or states. From this source proceeds the right of war, the security of ambassadors, the obligations arising from treaties, &c. The particular usages of nations in their mutual correspondence, which are not necessarily founded in reason, are no part of the law of nations in its proper sense; for they are arbitrary, and derive their sole authority from compact, either express or presumed; and may therefore, without violating the law of nature, be altered: for this reason, they ought to be thrown into the class of positive laws, whose obligation lasts no longer than the agreement upon which it is founded. Of this sort are the ceremonial used in receiving and entertaining ambassadors, the privileges indulged to some of their servants, the rules observed in cartels for exchanging prisoners of war, &c.

Civil Law.

(18, 19)

4. CIVIL or MUNICIPAL LAW is that which every sovereign kingdom or state has appropriated to itself. The appellation of municipal was originally confined to the laws of *municipia*, or dependent states; but it came by degrees to signify all civil laws without distinction. No sovereign state can subsist without a supreme power, or a right of commanding in the last resort; the supreme power of one age cannot, therefore, be fettered by any enactment of a former age, otherwise it would not be supreme. Hence, the law last in date derogates from prior laws; L. 4, *de const. princ.* (1, 4) (b).

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(b) When an Act repealing a former enactment is itself repealed, this does not now revive the Act or provision before repealed, unless there be reviving words. Where provisions are substituted for enactments which

5. The law of nature, where it either commands or forbids, is immutable, and cannot be controlled by any human authority; but where that law does no more than confer a right, without obliging us to use it, the supreme power may divest us thereof, in whole or in part. Thus, certain natural rights in point of dress, game, commerce, &c., are brought frequently, by positive enactment, under such restrictions as the Legislature thinks most proper for the common interest. It sufficiently appears that a sanction is annexed to the law of nature by its Author, from the disquiet that fills the conscience upon a transgression thereof, though the person guilty should be without the reach of human penalties: But certain laws of nature, as gratitude, charity, benevolence, &c., have not been guarded with penalties by the positive enactment of any state, but are left entirely to the conscience.

General properties of the law of nature.

6. Though the laws of nature are sufficiently published by the internal suggestion of natural light, civil laws cannot be considered as a rule for the conduct of life till they are notified to those whose conduct they are to regulate. The Scots Acts of Parliament were, by our most ancient custom, proclaimed in all the different shires, boroughs, and baron courts of the kingdom; 1425, c. 67; 1457, c. 89. But after our statutes came to be printed, in consequence of 1540, c. 127, that custom, which was no longer necessary, was gradually neglected; and at last the publication of our laws at the market-cross of Edinburgh was declared sufficient; and they became obligatory forty days thereafter; 1581, c. 128. British statutes are deemed sufficiently notified without formal promulgation; either because the printing is truly a publication, or because every subject is, by a maxim of the English law, a party to them, as being present in Parliament either by himself or his representative. After a law is published, no pretence of ignorance can excuse the breach of it; L. 9, *pr. et* § 3, *de jur. et fact. ign.* (22, 6).

Promulgation of laws.

(21, 37)

7. As laws are given for the rule of our conduct, they

Declaratory laws.

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are repealed, such repealed enactments remain in force till the substituted provisions come into operation; 13 & 14 Vict. c. 21, §§ 5, 6.

(23)

can regulate future cases only ; for past actions, being out of our power, can admit of no rule. Declaratory laws form no exception to this ; for a statute, where it is declaratory of a former law, does no more than interpret its meaning ; and it is included in the notion of interpretation that it must draw back to the date of the law interpreted. (c)

Divine positive law.

(26)

8. God Himself gave by Moses to the Jews a body of positive laws, which settled not only their public polity but private rights ; but as that law was directed to the Jews alone, and almost wholly framed with a special view to the Jewish constitution, and to the genius of that people, it is but a small part of it which has been adopted by the legislatures of other countries into their system of laws.

Roman Law.

(27, 28)

9. The ROMAN LAWS were, towards the middle of the sixth century, reduced by the Emperor Justinian into one body, which consists of the Digests or Pandects, the Institutions, the Code, and the Novels. Upon the irruption of the Lombards into Italy, soon after Justinian's death, this law became almost forgotten, till the year 1130, when a copy of the Pandects having been recovered at Amalphi, it was taught by authority in the schools of Italy, and from thence spread quickly over Europe. (d) The Roman law, from its

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(c) A statute now begins to operate from the time when it receives the royal assent, unless some other time be fixed by the Act itself ; 33 Geo. III. c. 13. The operation of a statute may either be postponed, or it may receive a retrospective relation, not merely by express provision, but by necessary construction. There is always, however, a presumption against retroactive effect, which becomes absolute in regard to rights made litigious.—See *Ladies M. & E. Kerr, petitioners*, Nov. 21, 1813, 16 F.C. 353 ; *Urquhart v. Urquhart*, Feb. 20, 1851, 13 D. 742, H. of L., 1 Macq. 658 ; *Kerr v. Marquis of Ailsa*, June 12, 1854, 1 Macq. 736 ; *Reid, &c., petitioners*, March 31, 1863, 1 Macph. 774. Some portions of a statute may refer to the future, while others are retrospective, *Lucas v. Gardner*, Feb. 8, 1878, 5 Ret. 638, & H.L. 5 Ret. 105 ; Dwaris on Statutes, 540 ; Kent's Com., i. 455 ; Savigny's Priv. International Law, &c., ch. ii.

(d) There is abundant evidence of the knowledge and continuing authority of the Roman law as a personal law (see Guthrie's Savigny, p. 15, 20), alongside of the *leges barbarorum*, not only in Italy, but in parts of France and Germany, during the period between the fall of the Western Empire, and the rise of the School of Bologna under Imerius and the Glossators.

peculiar beauty and elegance, got the appellation of the *Civil Law*, though that epithet was applicable originally to the laws of all countries alike. (e) In several Acts of Parliament this law, sometimes by itself,—1540, c. 69; 1585, c. 18,—and sometimes in conjunction with the canon law,—1540, c. 80; 1551, c. 22,—goes under the name of the *Common Law*. Where the expression in the Act is fuller—*the common laws of the realm*—it signifies perhaps our own ancient customary law; 1503, c. 79; 1584, c. 131, &c. (f)

10. Soon after the recovery of the Pandects, a body of Canon Law. law was formed under the direction of the Bishop of Rome, styled the CANON LAW. It contained rules, not only for informing the conscience, but for the fixing of property, civil as well as ecclesiastical, and had the authority of law in the countries where the Pope was temporal sovereign: but all the other nations of Christendom, even those which acknowledged the See of Rome, thought themselves at liberty, in so far as it related to civil right, either to reject it, or to receive it with such limitations as they judged proper. The Canon Law consists of the *Decretum*, which, in imitation of the Roman Digests, was composed by Gratian, a Benedictine monk, from the judgments of the fathers, doctors, and church councils; and of the *Decretal Epistles*, which, after the pattern of Justinian's Code, is a collection of the rescripts and constitutions of the Popes. (28)

11. The municipal LAW OF SCOTLAND, as of most other Law of Scotland. countries, consists partly of *statutory* or *written* law, which has the express authority of the legislative power; partly of *customary* or *unwritten* law, which derives force from presumed or tacit consent. (30)

12. Under our statutory or written law is comprehended, Our written law. Acts of Parliament. first, our *Acts of Parliament*; not those only which were made in the reign of James I. of Scotland, and from thence

(e) L. 1, 2, *Inst. de just. et jure* (i. 1).

(31)

(f) In England the phrase "common law" is used to designate the *unwritten* as opposed to the *written* or statute law. The former is a collection of customs and maxims, some of them anterior to statute, in theory merely recorded, but in truth extended, improved, or modified by the decisions of courts of law. See Stephen's Com., intr., sec. iii. vol. i. p. 41 *et seq.*; Maine's Ancient Law, pp. 13 *et seq.*, 31 *et seq.*

down to our union with England in 1707, but such of the British statutes enacted since the Union as concern this part of the United Kingdom.(g)

*Regiam  
Majestatem.*

(32-36)

13. The remains of our ancient written law were published by Sir John Skene, clerk-register, in the beginning of the last century, by license of Parliament (*Index to unprinted Acts*, 1607, No. 31, Thomson's *Acts of Parliament*, iv. 378). The books of *Regiam Majestatem*, to which the whole collection owes its title, seem to be a system of Scots law, written by a private lawyer at the command of David I.:(h) and though no express confirmation of that treatise by the Legislature appears, yet it is admitted to have been the ancient law of our kingdom, by express statutes; 1471, c. 47; 1487, c. 115. The borough laws, which were also enacted by the same King David, and the statutes of William, Alexander II., David II., and the three Roberts, are universally allowed to be genuine. Our Parliaments have once and again appointed commissioners to revise and amend the *Regiam Majestatem*, and the other ancient books of our law, and to make their report; 1425, c. 54; 1487, c. 115; 1633, c. 20; but as no report appears to have been made, nor consequently any ratification by Parliament, none of these remains are received as of proper authority in our courts; yet they are of excellent use in proving and illustrating our most ancient customs.

*Acts of  
Sederunt.*

(41)

14. Our written law comprehends (2) the *Acts of Sederunt*, which are ordinances for regulating the forms of proceeding before the Court of Session, in the administration of justice, made by the judges, who have a delegated power from the Legislature for that purpose; 1540, c. 93. Some of these Acts touch upon matter of right, which declare what the judges apprehend to be the law of Scotland, and what they are to observe afterwards as a rule of judgment.

*The authority of the  
civil and  
canon laws.*

(41, 42)

15. The civil and canon laws, though they are not perhaps

(g) As to the construction of modern statutes, Parliament is presumed to know the course of decisions in England when framing a Scotch Act; *Edin. Water Co. v. Hay*, 1854, 1 Macq. 682.

(h) They have been held by many to be an adaptation to Scotch purposes of Glanville's Treatise on the Laws of England. See *Ersk. Inst.*, i. 1, 32. Thomson's *Acts*, vol. iv. p. 378.

to be deemed proper parts of our written law, have undoubtedly had the greatest influence in Scotland. The powers exercised by our sovereigns and our judges have been justified upon no other ground than that they were conformable to the civil or canon laws; 1493, c. 51; 1540, c. 69, &c. And a special statute was judged necessary, upon the Reformation, to rescind such of their constitutions as were repugnant to the Protestant doctrine; 1567, c. 31. From that period, the canon law has been little respected, except in questions of tithes, patronages, and some few more articles of ecclesiastical right: but the Roman continues to have great authority in all cases where it is not derogated from by statute or custom, and where the genius of our law suffers us to apply it; 1493, c. 51; 1540, c. 70; 1587, c. 31.(i)

16. Our unwritten or customary law is that which, without being expressly enacted by statute, derives its force from the tacit consent of King and People; which consent is presumed from the ancient custom of the community—L. 32, § 1, *de legib.* (1, 3)—as the laws of primogeniture and succession, the legitim, terce, courtesy, &c. No precise time can be fixed as necessary for constituting this sort of law; because some things require in their nature longer time and a greater frequency of acts to establish them than others. Custom, as it is equally founded in the will of the lawgiver with written law, has therefore the same effects: hence, as one statute may be explained or repealed by another, so a statute may be explained by the uniform practice of the community—L. 37, *de legib.* (1, 3)—and even go into disuse by a posterior contrary custom. But this power of custom to derogate from prior statutes is generally confined by lawyers to statutes concerning private right, and does not extend to those which regard public policy.(j)

Unwritten law  
or custom.

(43)

Its properties.

(i) As to the authority of the civil and canon laws in Scotland, see Craig de Feudis, i. 2; i. 8, §§ 16, 17; i. 3; Stair, i. 1, §§ 12, 14, 16; Bankton, i. 1, §§ 40, 42; Erskine's Inst., i. 1, §§ 27, 28, 41, 42; Hume's Criminal Law, i. 15.—MORE. See *per* Lord Brougham in *Campbell v. Thomson's Trs.*, 5 W. & S. 25. Sir G. Mackenzie's Obs. on the Act 1621, Works, vol. ii. p. 7.

(j) This doctrine is modified in the Institutes in consequence of a decision to the effect that public laws concerning the elections of magis-

Decisions of  
the Session.

(47)

17. An uniform tract of the judgments or *decisions* of the Court of Session is commonly considered as part of our customary law ; and, without doubt, where a particular custom is thereby fixed or proved, such custom of itself constitutes law : but decisions, though they bind the parties litigating, have not, in their own nature, the authority of law in similar cases : yet, where they continue uniform, great weight is justly laid on them. Neither can the judgments of the House of Peers of Great Britain reach farther than to the parties in the appeal, since in these the Peers act as judges, not as law-givers ; nevertheless, where a similar judgment is repeated in the court of the last resort, it must have the strongest influence upon the determinations of inferior courts.

Judgments of  
the House of  
Peers.

Interpretation  
of laws.

(49)

18. By the rules of interpreting statute law received in Scotland, an argument may be used from the title to the act itself, *a rubro ad nigrum* ; at least where the rubric has been either originally framed, or afterwards adopted by the Legislature. The preamble or narrative, which recites the inconveniences that had arisen from the former law, and the causes inducing the enactment, may also lead a judge to the general meaning of the statute. But the chief weight is to be laid on the statutory words.(k)

(50)

19. Laws, being directed to the unlearned, as well as the learned, ought to be construed in their most obvious meaning, and not explained away by subtle distinctions ; and no law is to suffer a figurative interpretation where the proper sense of the words is as commodious and equally fitted to the subject of the statute. Laws ought to be explained so as to exclude absurdities, L. 19, *de legib.* (1, 3) ; and in the sense which

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trates of burghs may fall into disuse ; *Smollett v. Buntein*, Feb. 19, 1730, 2 Pat. Ap. 26 ; *Paterson v. Just*, Dec. 6, 1810, 16 F.C., 70. See as to the general rule, *Johnstone v. Stott*, 1802, 4 Pat. 274 ; *Bell's Execrs. v. Murray*, Nov. 28, 1849, 12 D. 201. In England statutes are not repealed by desuetude.

(k) "Although the title has occasionally been referred to as aiding in the construction of the Act, it is certainly no part of the law, and in strictness ought not to be taken into consideration at all ; but the preamble is undoubtedly a part of the Act, and may be used to explain it," though it cannot control the enacting part, which often goes beyond it. *Per Pollock, C.B., in Salkeld v. Johnson*, 2 Ex. 256, 283.

appears most agreeable to former laws, L. 28, *eod. t.*; to the intention of the lawgiver, L. 17, 18, *eod. t.*; and to the general frame and structure of the constitution. In prohibitory laws, <sup>Prohibitory laws.</sup> where the right of acting is taken from a person solely for the private advantage of another, the consent of him in whose behalf the law was made shall support the act done in breach of it; but the consent of parties immediately interested has no effect in matters which regard the public utility of a state; L. 38, *de pact.* (2, 14).<sup>(l)</sup> Where the words of a statute are capable of but one meaning, the statute must be observed, however hard it may bear on particular persons; L. 12, § 1, *qui et a quib.* (40, 9): nevertheless, as no human system of laws can comprehend all possible cases, more may be sometimes meant by the lawgiver than is expressed; and hence <sup>Interpretation by extension.</sup> certain statutes, where extension is not plainly excluded, may be extended beyond the letter to similar and omitted cases; others are to be confined to the statutory words. (60)

20. A strict interpretation is to be applied—1. To corrective statutes, which repeal or restrict former laws; L. 14, *de legib.* (1, 3); and to statutes which enact heavy penalties or restrain the natural liberties of mankind. <sup>Strict interpretation.</sup> 2. Laws made on occasion of present exigencies in a state ought not to be drawn to similar cases after the pressure is over. 3. Where statutes establish certain solemnities as requisite to deeds, such solemnities are not suppliable by equivalents; for solemnities lose their nature when they are not performed specially.<sup>(m)</sup> 4. A statute which enumerates special cases,<sup>(n)</sup> is with difficulty to be extended to cases not expressed; but where a law does not descend to particulars there is (53, 54, 59)

(l) *E.g.*, a jurisdiction conferred for the first time by a statute "is a matter of public policy which no private arrangement can supersede;" and it must be exercised in substantial in the way prescribed, notwithstanding a waiver of objections by parties; *Miller v. McCallum*, Nov. 14, 1840, 13 D. 65; *Harvey v. Forrest*, Nov. 25, 1841, 4 D. 97, H. of L., April 25, 1845, 4 Bell's Ap. 197; *Penman*, 2 Br. 586.

(m) See *Earl of Fife v. E. of Fife's Trs.*, Nov. 19, 1819, 20 F.C. 33, rev. 1 S. Ap. 498; *Thomson v. McCrummen's Trs.*, Feb. 1, 1856, 18 D. 470, aff. 31 Jur. 525; *Johnston v. Pettigrew*, June 16, 1865, 3 Macph. 954. As to the solemnities of deeds see *infra*, iii. 2, 3 *et seq.*

(n) See *Normant v. Wilson*, Jan. 25, 1845, 2 Br. 375.

- (55) greater reason to extend it to similar cases. 5. Statutes which carry a dispensation or privilege to particular persons or societies suffer a strict interpretation; because they derogate from the general law, and imply a burden upon the rest of the community; but at no rate can a privilege be explained to the prejudice of those in whose behalf it was granted. As the only foundation of customary law is usage, which consists in fact, such law can go no farther than the particular usage has gone.

Ample interpretation.

- (56, 57) 21. All statutes concerning matters specially favoured by law receive an ample interpretation; as laws for the encouragement of commerce or of any useful public undertaking, for making effectual the wills of dying persons, for restraining fraud, for the security of creditors, &c. A statute, though its subject-matter should not be a favourite of the law, may be extended to similar cases which did not exist when the statute was made, and for which, therefore, it was not in the lawgiver's power to provide.

22. Every statute, however unfavourable, must receive the interpretation necessary to give it effect; and, on the other hand, in the extension of favourable laws, scope must not be given to the imagination in discovering remote resemblances; the extension must be limited to the cases immediately similar. Where there is ground to conclude that the Legislature has omitted a case out of the statute purposely, the statute cannot be extended to that case, let it be ever so similar to the cases expressed.

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## TIT. II.—OF JURISDICTION AND JUDGES IN GENERAL.

- Jurisdiction. (2, 3) 1. The objects of law are, PERSONS, THINGS, and ACTIONS. Among persons, *judges*, who are invested with *jurisdiction*, deserve the first consideration. Jurisdiction is a power conferred upon a judge or magistrate to take cognisance of and decide causes according to law, and to carry his sentences into execution. That tract of ground or district within which a judge has the right of jurisdiction is called his territory;

and every act of jurisdiction exercised by a judge without his territory, either by pronouncing sentence or carrying it into execution, is null; L. 20, *de jurisd.* (2, 1); *Millar v. Crawford*, Dec. 5, 1671, M. 7293.(o)

2. The supreme power which has the right of enacting law, falls naturally to have the right of erecting courts and appointing judges who may apply these laws to particular cases: but in Scotland this right has been from our earliest times entrusted with the Crown, as having the executive power of the state. In our supreme Courts of Session and Exchequer,(p) not only process, but execution of diligence, runs in the name of the Sovereign; notwithstanding which these courts have a proper jurisdiction, seeing all their necessary writs, both of process and execution, issue under their own direction.

The king  
the fountain  
of jurisdic-  
tion.

(3)

3. Jurisdiction was, by the Roman law, either voluntary or contentious. *Voluntary* was that which related to matters that admitted of no opposition; and therefore might be exercised by any judge, and upon any day, and in any place.(q) *Contentious* was that which was exercised in debateable matters, which were by their nature capable of receiving a judicial discussion; and this sort could not be proceeded in but upon a lawful day, in court, and by that judge alone who was competent to the suit. The judicial ratifications of women clothed with husbands may be classed among the acts of voluntary jurisdiction; *Cochrane v. Bathgate*, Feb. 3, 1688, M. 7294.

Jurisdiction  
voluntary  
and conten-  
tious;

(4)

4. Jurisdiction is either supreme, inferior, or mixed. That jurisdiction is *supreme* from which there lies no appeal

supreme, in-  
ferior, and  
mixed;

(5, 6)

(o) By 16 & 17 Vict. c. 80, § 47, Sheriffs are expressly authorised to pronounce and sign judgments out of their territories. Provision is made by statute for the execution of judgments of the courts of England, Ireland, and Scotland in parts of the United Kingdom not subject to their jurisdiction, upon registration of a certificate in the books of the court in whose territory execution is desired; 31 & 32 Vict. c. 54 (Judgments Extension Act, 1868). See *Moyes v. Whinney*, Dec. 6, 1864, 3 Macph. 183.

(p) Merged in Court of Session; 19 & 20 Vict. c. 56, *infra*, i. 3, 17.

(q) *Cochrane*, 1688, M. 7294; *Kerr v. M. of Ailsa*, June 12, 1854, 1 Macq. 736.

to a higher court. Though the British House of Peers is, since the union of the two kingdoms, our only supreme court in a strict acceptation, our Courts of Session, Justiciary,<sup>(r)</sup> and Exchequer, may still be called supreme in a lower sense, as their jurisdiction is universal over the whole kingdom, as the sentences of all other courts are subject to the review of one or other of them, and as *their* sentences can be brought under review by no court proper in Scotland. *Inferior* courts are those whose sentences are subject to the review of the supreme courts, and whose jurisdiction is confined to a particular county, borough, or other territory; as sheriffs, justices of the peace, magistrates of boroughs, inferior admirals and commissaries, barons, &c. *Mixed* jurisdiction participates of the nature both of the supreme and inferior: thus, the Judge of the High Court of Admiralty, and the Commissaries of Edinburgh, have an universal jurisdiction over Scotland, and they can review the decrees of inferior admirals and commissaries; but since their own decrees are subject to the review of the Courts of Session or Justiciary, they are, in that respect, inferior courts.<sup>(s)</sup>

civil and  
criminal;

(5, 7, 8)

5. Jurisdiction is either civil or criminal: by the first, questions of private right are decided; by the other, crimes are punished.<sup>(t)</sup> But in all jurisdiction, though merely civil, there is a power inherent in the judge to punish, either corporally or by a pecuniary fine, those who offend during the

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(r) The sentences of the Justiciary Court are not subject to the review of the House of Lords, or of any other tribunal; 2 Hume 286. *Mackintosh v. H.M. Adv.*, Mar. 23, 1876, 3 R. (H. L.) 34. See *infra*, t. 3, § 13 *et seq.*

(s) These courts are now abolished, and their jurisdiction transferred to the Court of Session or the Sheriffs; 1 Will. IV. c. 69, and 1 & 2 Vict. c. 119, § 21.

(t) "In all proceedings by way of complaint instituted in Scotland in virtue of any statute," the jurisdiction shall be deemed to be of a criminal nature where on conviction "the court shall be required or shall be authorised to pronounce sentence of imprisonment," or "in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent" for a limited period; and in all other such proceedings "the jurisdiction shall be held to be civil;" 27 & 28 Vict. c. 53 (Summary Procedure Act, 1864), § 28.

proceedings of the court, or who shall afterwards obstruct the execution of the sentence; *omnia enim cum jurisdictione concedi videntur, sine quibus jurisdictio explicari nequit*; L. 2, *de jurisd.* (2, 1).

6. Jurisdiction is either privative or cumulative. *Privative* jurisdiction is that which belongs only to one court, to the exclusion of all others. *Cumulative*, otherwise called *concurrent*, is that which may be exercised by any one of two or more courts in the same cause. In civil cumulative jurisdiction the private pursuer has the right of election before which of the courts he shall sue; but as in criminal questions, which are prosecuted by a public officer of court, a collision of jurisdiction might happen through each of the judges claiming the exercise of their right, that judge by whose warrant the delinquent is first cited or apprehended (which is the first step of jurisdiction) acquires thereby (*jure præventionis*) the exclusive right of judging in the cause. But no citation by the procurator-fiscal, or public prosecutor of one court, which is simply intended *ad vindictam publicam*, can bar the private party injured from bringing his process for damages, which is a right merely civil, before any other competent court; *Scott v. Riddell*, Nov. 9, 1671, M. 7315; *Fork v. Fyfe*, July 1, 1673, M. 7316.

7. All rights of jurisdiction, being originally granted in consideration of the fitness of the grantee, were therefore personal, and died with himself. But upon the introduction of the feudal system, by which certain jurisdictions, as of sheriffship, regality, &c., were annexed to lands, these jurisdictions became patrimonial and descendible to heirs, as well as the lands to which they were annexed; and even after sheriffships ceased to be territorial, by the Sovereign's resuming the jurisdiction to himself from the proprietors of the lands to which it was originally annexed,—Craig, i. 12, § 14,—the Crown frequently made heritable grants of them to others. But by 20 Geo. II. c. 43, all heritable jurisdictions, except those of admiralty, and a small pittance reserved to barons, are either abolished or resumed and annexed to the Crown.(u)

privative and  
cumulative;

(9, 10)

personal and  
heritable:

(11, 12)

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(u) See *infra*, i. 4, 6.

proper and  
delegated.

(13)

8. Jurisdiction is either proper or delegated. *Proper* jurisdiction is that which belongs to a judge or magistrate himself, in virtue of his office. *Delegated* is that which is communicated by the judge to another who acts in his name, called a depute or deputy. The sheriffs appointed by the Jurisdiction Act are improperly termed sheriffs-depute. Where a deputy appoints one under him, he is called a substitute. No grant of jurisdiction, which is an office requiring personal qualifications, can be delegated by the grantee to another without an express power in the grant. Such power has been given in all personal grants of sheriffship, stewardry, admiralty, &c.; but justices of the peace and magistrates of boroughs have no power of deputation. In patrimonial jurisdiction, as it was possible the heritable officer might be incapable of rightly discharging the office in proper person, he was empowered to appoint deputies, for whom he should be answerable; 1424, c. 6.

Civil jurisdic-  
tion is  
founded—  
(1) *Ratione*  
*domicilii*;

(14, 16)

9. Civil jurisdiction is founded—(1) *ratione domicilii*, if the defender has his domicile within the judge's territory. A domicile is the dwelling-place where a person lives, with an intention to remain; and custom has fixed it as a rule, that residence for forty days founds jurisdiction. (v) If one

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(v) "Where a person not having a dwelling-house in Scotland occupied by his family or servants shall have left his usual place of residence, and have been absent therefrom during the space of forty days without having left notice where he is to be found in Scotland, he shall be held to be absent from Scotland, and be charged or cited according to the forms herein prescribed."—6 Geo. IV. c. 120, § 53 (Judicature Act).

"It is necessary to distinguish a domicile for citation, i.e., a domicile sufficient to support an action, from the domicile of permanent residence or succession, which regulates the status of parties during their life, and the distribution of their property after death. Although no one can have more than one domicile of succession, he may have any number of domiciles for citation, according to his residence within the territory of different judges. The circumstance that a party was born in Scotland creates no jurisdiction against him in the court of this country if he has left Scotland *animo remanendi*; *Grant v. Pedie*, July 5, 1825, 1 W. & S. 716. But while mere origin does not itself create jurisdiction, it leads readily to a revival of jurisdiction. Lord Ivory, in his notes to Erskine, observes—'Finally, there can be no doubt that the moment a Scotchman returns to this country the jurisdiction of the native courts at once revives,

has no fixed dwelling-place,—*e.g.*, a soldier, or a travelling merchant,—a personal citation against him within the territory is sufficient to found the judge's jurisdiction over him, even in civil questions; *Lees v. Parlan*, Nov. 12, 1709, M. 4791.(w) As the defender is not obliged to appear before a court to which he is not subject, the pursuer must follow the defender's domicile, *Actor sequitur forum rei*.

10. It is founded (2) *ratione rei sitæ*, if the subject in question lie within the territory. If that subject be immoveable, the judge, whose jurisdiction is founded in this way, is the sole judge competent, excluding the judge of the domicile; for an immoveable subject cannot shift places, and must therefore be restored in that place where it is situated.(x) (2) *Ratione rei sitæ*.  
(17)

11. Where one who has not his domicile within the territory is to be sued before an inferior court *ratione rei sitæ*, the Court of Session must be applied to, whose jurisdiction is universal, and who, of course, grant letters of supplement to cite the defender to appear before the inferior judge.(y) Letters of supplement.  
(18, 19) Where the party to be sued resides in another kingdom, and has an estate in this, the Court of Session is the only proper court, as the *commune forum* to all persons

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though he be here transiently only. But in this case the defender must either be cited personally or have acquired a legal domicile by residence for forty days in one place.'—See *Ritchie v. Fraser*, Dec. 11, 1852, 15 D. 205. 'A good deal of difficulty,' said Lord Ivory, 'has arisen from confounding jurisdiction with citation. A domicile of citation is necessary where the party is not resident, in order to ensure the next most effectual way of giving him notice of the action. But there is no need of a domicile of citation where the party is personally cited. It is enough if the Court had jurisdiction over him when he was cited. The jurisdiction thus created is only in the Court of Session, and not in any inferior court.' *Crichton v. Robb*, Feb. 9, 1860, 22 D. 728."—MOIR. But see below, p. 17, note.

(w) *M'Niven v. M'Kinnon*, Feb. 14, 1834, 12 S. 453.

(z) The possession of heritable estate, even on a personal title, or of a lease, is a general ground of jurisdiction in all personal actions; *Fraser*, Jan. 14, 1870, 8 Macph. 400.

(y) Such a defender is now cited on the sheriff's own warrant or precept, indorsed by the sheriff-clerk of the district where it is proposed to execute the citation; 1 & 2 Vict. c. 119, § 24.

residing abroad ;(z) and the defender, if his estate be heritable, is considered as lawfully summoned to that court by a citation at the market-cross of Edinburgh, and pier and shore of Leith.(a) But where a stranger, not a native of Scotland, has only a moveable estate in this kingdom, he is deemed to be so little subject to the jurisdiction of our courts,(b) that action cannot be brought against him till his effects be first attached by an arrestment *jurisdictionis fundandæ causa* ;—Harc. 487 ; *Young v. Arnold*, M. 4833 ;—which is laid on by a warrant issuing from the supreme courts of Session or Admiralty, or from that within whose territory the subject is situated, at the suit of the creditor.(c)

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(z) See last paragraph of note (c).

(a) Edictal citations are now made by delivery of a copy of the citation or other writ at the office of the Keeper of Edictal Citations at the Register House, where a register is kept and published ; 6 Geo. IV. c. 120, § 51 ; 13 & 14 Vict. c. 36, § 22. See A. S., Dec. 18, 1868 ; and as to consistorial actions, 24 & 25 Vict. c. 86. As to arrestments, 1 & 2 Vict. c. 118, c. 114, § 18.

(b) "Personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner." *Per* Lord Loughborough, 1 H. B. 690.

(c) "In the earliest case in Scotland the allegation was that a Frenchman having moveables here was in the course of withdrawing them in order to prejudice a claim against him arising out of a testament, and concluding to have these effects arrested till he should find caution *judicio sisti* and *judicatum solvi*. The Court decided in the affirmative ; *Young v. Arnold*, 1683, M. 4833. Out of this case seems to have arisen gradually the practice that in all cases where there were personal effects or moveable debts of any kind in Scotland belonging to a foreigner, the creditor might, by an application to the court, whether superior or inferior, in which he contemplated action, lay a *nexus* on their goods or effects, which would prevent the debtor in the obligation from paying over the debt, or the possessors of the moveables from delivering them up to the foreigner, until security was found *judicio sisti*.—See *Ford*, Nov. 21, 1758, M. 4835. It is now found that security *judicatum solvi* can no longer be demanded as the condition of loosing arrestment. But this mode of founding jurisdiction is not applicable to questions of marriage or legitimacy, of alienage, or any other question which regards personal status or its attendant rights ; *Swinton v. Gray*, Dec. 1, 1772, M. 4882. The jurisdiction thus created against a foreigner is only a jurisdiction in the Court of Session, just as in the case of an actual *res sita*, such as a landed estate belonging to a

12 A judge may in special cases arrest or secure the persons of such as have neither domicile nor estate within his territory, even for civil debts. Thus, on the border between Scotland and England, warrants are granted of course by the judge-ordinary of either side, against those who have their domicile upon the opposite side, for arresting their persons, till they give caution *judicio sisti*; (d) and

Arrestment of strangers.

foreigner in Scotland; *Burn v. Purvis*, Dec. 13, 1828, 7 S. 194. An arrestment is personal to the individual, and falls by the death of the party against whom the jurisdiction is constituted. And therefore action cannot proceed against the representative of that party without a new arrestment to found jurisdiction used against those representatives; *Cameron v. Chapman*, March 9, 1838, 16 S. 907, apparently overruling *Dundas v. M'Leod*, Dec. 13, 1743, M. 2038. The whole doctrine of jurisdiction founded by arrestment was reviewed in the leading case of *Lindsay v. N. W. Ry. Co.*, Nov. 20, 1855, 18 D. 62; aff. Feb. 23, 1858, 3 Macq. 99. It appears from this case that jurisdiction of this kind would not be sustained in a purely declaratory action. The House of Lords 'avoided an expression of opinion on the question whether the creditor could obtain a remedy beyond the value of the goods arrested;' but according to the views of Scotch lawyers this is not matter of doubt. If the jurisdiction is once constituted, the party is entitled to his decree for the full amount of his claim, leaving him to work out his remedy in any way competent to him."—MOIR.

Arrestment of a ship *jurisdictionis fundandæ causa*, by warrant of a sheriff, gives room for the sheriff's jurisdiction in maritime causes. *Brake v. Grunwaldt*, Jan. 2, 1864, 2 Macph. 335.

Erskine in the Institutes, i. 2, 20, mentions another ground of jurisdiction, *ratione contractus*. Professor Moir observes that, on the statement of Erskine, the difficulty is to see what remaining point turns on the place of contract in addition to the grounds of jurisdiction we already possess in arrestment *j. f. c.*, and the domicile of citation. But it is fixed by *Sinclair v. Smith*, July 17, 1860, 22 D. 1475, and other cases, that a contract made or to be fulfilled in Scotland, may be enforced, or damages for its breach sued for, against a party domiciled in England, if he is found and personally cited in this country, without either a domicile of citation or an arrestment to found jurisdiction.

A foreigner is subjected to the jurisdiction even of an inferior court where he has been personally cited within its territory; *Pirie v. Warden*, Feb. 20, 1867, 5 Macph. 497; whether the ground of action is contract or quasi-delict; *Kermick v. Watson*, July 7, 1871, 10 Macph. 984.

(d) Great irregularities existed in issuing border warrants from the sheriff-clerk's office in border counties, without any authority at all. This practice was authoritatively declared to be illegal in *Landell v.*

even the persons of citizens or natives(e) may be so secured where there is just reason to suspect that they are *in meditatione fugæ*—i.e., that they intend suddenly to withdraw from the kingdom; upon which suspicion, the creditor who applies for the warrant must make oath.(f) An inhabitant of a borough-royal, who has furnished one who lives without the borough in meat, clothes, or other merchandise, and who has no security for it but his own count-book, may arrest his debtor till he give security *judicio sisti*; 1672, c. 8.

Grounds of  
declinature.

(24-26)

1. *Ratione  
cause*;

2. *Ratione sus-  
pecti judicis*;

13. A judge may be declined—i.e., his jurisdiction disowned judicially—1. *Ratione cause*, from his incompetency to the special cause brought before him. Thus, the Court of Session may be declined in criminal causes; inferior judges in declarators of property, &c.(g) 2. *Ratione suspecti judicis*; where either the judge himself, or his near kinsman, has an interest in the suit. Where a company is constituted by patent or act of Parliament, by which a public benefit is intended, a judge cannot be declined in the cause of such company merely because he is a proprietor; an example of which we have in our bank companies; see *Voet. Com. tit. de judic.*, v. 1, § 45.(h) The judges of the Session were, by 1594, c. 216, disqualified from voting in the causes of their

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*Landell*, Jan. 26, 1838, 16 S. 388; March 6, 1841, 3 D. 819; see *Purves v. Landell*, March 10, 1845, 4 Bell's Ap. 46.

(e) In the Institutes, the author says—"It makes no difference whether the debtor be a foreigner or a native," and "some late decisions confirm this in many points;" Bell's Com., ii. 563 (Shaw 1089); see *Crowder v. Watson*, Nov. 18, 1831, 10 S. 29, aff. 6 W. & S. 271; *Muir v. Collett*, June 28, 1861, 23 D. 1229.

(f) He must also make oath to the truth of his demand, and must specify in his oath the grounds of his suspicion; see Bell's Com., l. c.

(g) See *infra*, i. iv. 2.

(h) It is no disqualification to be a proprietor of stock of any Scotch chartered bank interested in a cause; A. of S., Feb. 1, 1820; or a partner of an insurance company, or owner merely as a trustee of stock or shares in any incorporated company; 31 & 32 Vict. c. 100, § 103. It is still a ground of declinature that a judge is a partner of any joint-stock company which does not carry on as its sole or principal business that of fire or life insurance; that he possesses, as an individual, stock or shares in an incorporated company; or that he is a partner, as a trustee or an individual, in any company not incorporated, where such company is interested in a cause.

fathers, brothers, or sons: but, by 1681, c. 13, one rule is laid down for all judges, supreme and inferior, that no judge can vote in the cause of his father, brother, or son, either by consanguinity or affinity; nor in the cause of his uncle or nephew by consanguinity. (i) A deputy may be declined as suspected, where the principal judge is a party, 1555, c. 39, § *ult.*; except in causes in which he is authorised to judge by special statute, 1579, c. 84. (j)

14. Judges may be declined, 3, *ratione privilegii*; where the party is by privilege exempted from their jurisdiction. *3. Ratione privilegii.* Thus, all members of the College of Justice may decline the jurisdiction of inferior judges, 1555, c. 39: but as such privilege has no operation till it be pleaded, therefore, if declinature be not proponed, the judge may proceed in the cause. (k) The privilege exempting Members of Parliament from civil jurisdiction, sitting the Parliament, is so strongly founded that action cannot proceed against them unless they expressly waive their privilege. (l) (24; i. 3, 8)

15. Prorogated jurisdiction (*jurisdictio in consentientes*) is that which, by the consent of parties, is conferred upon a judge who, without such consent, would be incompetent. A defender's absence does not infer his consent; the decree will be void, as pronounced *a non suo iudice*, if an explicit consent be not adhibited, or some positive act done by the defender importing consent, *e.g.*, exhibiting defences *in causa*. Because, where a judge is incompetent, every step he takes *It requires (1) consent of parties.* (27)

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(i) *Ommanney v. Smith*, Feb. 13, 1851, 13 D. 678; *Gordon v. Gordon's Trs.*, March 2, 1866, 4 Macph. 509; *Coms. of Highland Roads v. Mackray*, June 25, 1858, 20 D. 1165.

(j) A sheriff-substitute may judge in a cause in which his principal may be declined; *Wallace v. Colquhoun*, Jan. 21, 1823, 2 S. 130 (127), 21 F.C. 99.

(k) This privilege is entirely taken away so far as regards proceedings in sheriff-courts; 16 & 17 Vict. c. 80, § 48; see 13 & 14 Vict. c. 36, § 17.

(l) This privilege is taken away by 10 Geo. III. c. 50; but Peers are still exempt from arrest in *civil* cases at all times; and Members of the House of Commons during the sitting of Parliament, and for forty days after every prorogation, and forty days before the next appointed meeting; Bell's Pr. 2145, 2149; Stephen's Com., ii. 356. As to crimes, see Macdonald's Crim. Law, 272; Hume, ii. 48.

must be null till his jurisdiction be made competent by the party's actual submission to it. It is otherwise where the judge is competent, but may be declined by the party upon privilege; *supr.* § 14. Where the defender pleads a declination which is repelled, prorogation is not inferred, though he should afterwards offer defences *in causa*; *Shaw v. Buchanan*, July 29, 1696, M. 7314.

Does a clause  
for registering  
import con-  
sent?

(28)

16. A clause consenting to the registration of a writing in the books of a judge's court does not imply a prorogation of that judge's jurisdiction in any question that may be moved afterwards upon the effect of the writing; such consent is limited to the registration, which is *quodammodo jurisdictionis voluntaria*, and is not to be stretched, by implication, to acts of contentious jurisdiction.

(2) Jurisdic-  
tion in the  
judge.

(27, 79)

17. In order to prorogation, the judge must have jurisdiction such as may be prorogated; L. 1, *de judic.* (5, 1). Hence prorogation cannot be admitted where the judge's jurisdiction is excluded by statute; which seems to be the case of 1681, c. 13.(m) Hence, likewise, no consent can prorogate the jurisdiction of a judge whose commission is vacated, or

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(m) *I.e.*, The case of a judge disqualified by propinquity to a party, *supra*, § 13. Even where a special jurisdiction is conferred by statute, it must be exercised in conformity with the statute; and the actings of parties, though they may import a waiver of objections to defects in form, cannot cure a defect in the jurisdiction itself; *Harvey v. Forrest*, Nov. 25, 1841, 4 D. 97, aff. April 25, 1845, 4 Bell's Ap. 197. But the acts of those who are "holden and reputed" to be the proper possessors, and who are exercising the duties, of a judicial office, are held good, although in fact they may not have, upon investigation, any title to such office; *Stair*, iv. 42, 12; *Livingstone v. Presby. of Hamilton*, June 26, 1846, 8 D. 898, aff. May 15, 1849, 6 Bell's Ap. 469; *M'Arthur v. Linton*, Feb. 13, 1864, 2 Macph. 659.

Jurisdiction *ex*  
*Reconvention.*

When a foreigner, over whom the courts have no jurisdiction, pursues a native in the courts of the native's domicile, the latter is entitled to bring a counter-action against the foreigner, not otherwise subject to the jurisdiction, if it be necessary to protect himself from any disadvantage in settling their mutual rights, to which he would not be exposed were the pursuer a native. This is called Reconvention, and it is regarded by some as proceeding on the principle of prorogation; see *Thomson v. Whitehead*, Jan. 25, 1862, 24 D. 331; *Morrison v. Massa*, Dec. 8, 1866, 5 Macph. 130.

its term expired ; nor of a judge while he is out of his territory. But a defender, though his domicile be without a judge's jurisdiction, may, if cited within the territory, subject himself to the jurisdiction by appearing in court and offering peremptory defences, *Service v. Chalmers*, Feb. 23, 1627, M. 7305.(n)

18. In questions of civil jurisdiction, a judge who was only constituted to a certain sort of causes might, by the Roman law, have had his jurisdiction prorogated to causes of a different nature, L. 1, C. *de jurisd. omn. jud.* (3, 13). By our practice such prorogation is rejected; *Bethune v. His Tenant*, M. 7307. Yet where the cause is of the same nature with those to which the judge is competent, though law may have confined his jurisdiction within a certain sum, parties may prorogate it above that sum, unless where prorogation is prohibited; an instance of which prohibition we have in the jurisdiction of barons, as restricted by 20 Geo. II. c. 43. Prorogation is not admitted in the King's causes; for the interest of the Crown cannot be hurt by the negligence of its officers in the management of processes; 1600, c. 14; *Eyres v. Hunter and Campbell*, Jan. 19, 1711, M. 7596.

*Prorogatio de causis in causam.*

(30, 31)

19. All Judges must at their admission swear—(1) the Oath of Allegiance, and subscribe the Assurance, 1693, c. 6; (2) the Oath of Abjuration, which was first imposed 6 An. c. 14, and has been since continued by several British statutes; (3) the Oath of Supremacy, 1 Geo. I. c. 13; lastly, the oath *de fidei administratione*.(o)

*Oaths to be taken by judges.*

(33)

20. A party who has either properly declined the jurisdiction of the judge before whom he had been cited, or who thinks himself aggrieved by any proceedings in the cause,

*Letters of advocacy;*

(iv. 2, 40, 41)

(n) *Longmuir*, May 22, 1850, 12 D. 926; *Irvine v. Hart*, March 10, 1869, 7 Macph. 723. The doubt stated in the Inst., l. c., does not appear to be well founded.

(o) These oaths, except the first and last, are abolished by 31 & 32 Vict. c. 72 (Promissory Oaths Act), and simple forms of the oath of allegiance and judicial oath are enacted. Changes had previously been made by 21 & 22 Vict. c. 48, and 30 & 31 Vict. c. 75, which are not expressly repealed.

may, before decree, apply to the Court of Session to issue letters of advocation for calling the action from before the inferior court to themselves. The grounds, therefore, upon which a party may pray for letters of advocation are incompetency and iniquity. Under incompetency is comprehended not only defect of jurisdiction but all the grounds of declining a jurisdiction in itself competent, arising either from suspicion of the judge or privilege in the parties. A judge upon iniquity. is said to commit iniquity when he either delays justice, or pronounces sentence, in the exercise of his jurisdiction, contrary to law.(p)

Effect of  
advocation.

(iv. 2, 41, 42)

21. Though the grounds on which letters of advocation proceed are personal respecting that judge alone who is incompetent, or who has committed iniquity, yet their style carries an injunction to all inferior judges not to proceed in the cause. And even where that part of style happened to be omitted, the nature of an advocation was adjudged to imply a general prohibition; *Cranstoun v. Home*, July 18, 1623, M. 366. But, till the advocation be intimated, it can neither restrain judges from deciding nor parties from insisting. If, after intimation, a judge shall presume to proceed, his sentence is null; and both he and the party insisting are punishable for contempt of authority.(q)

How limited.

(iv. 2, 43)

22. That the Court of Session may not waste their time in trifles, no cause for a sum below 200 merks Scots, 1663, c. 9 (now £12 sterling, by 20 Geo. II. c. 43), can be advocated to the Court of Session from the inferior judge competent.(r) But if an inferior judge shall proceed upon a cause to which he is incompetent, the cause may be

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(p) The form of advocation is abolished by 31 & 32 Vict. c. 100, § 64; and an "appeal" is substituted in cases where advocation was previously competent, §§ 65-80. These cases are, in sheriff-courts, interlocutors (1) sisting process, (2) giving interim-decree for payment of money, (3) disposing of the whole merits of the cause although the question of expenses is not decided, or though expenses are given but not decerned for; 16 & 17 Vict. c. 80, § 24.

(q) See 1 & 2 Vict. c. 86, § 1, and A. of S., 1839, § 128. The sheriff may regulate interim possession; 31 & 32 Vict. c. 100, § 79.

(r) The limit is now £25; 16 & 17 Vict. c. 80, § 22.

carried from him by advocacy, let the subject be ever so inconsiderable.(s)

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III. III.—ON THE SUPREME JUDGES AND COURTS OF SCOTLAND.

1. The King, who is the fountain of jurisdiction, might, King. by our constitution, have judged in all causes, either in his own person,—1469, c. 26, *in fin.*, of which Sir Thomas Craig gives a strong instance, p. 519, § 12,—or by those whom he was pleased to vest with jurisdiction. In the reign of Charles II. the Parliament extended this part of the prerogative by declaring that the King retained a cumulative jurisdiction, notwithstanding any offices or grants of jurisdiction formerly conferred upon his subjects, 1681, c. 18; in consequence of which, he assumed a power of erecting regalities within the bounds of heritable sheriffships, &c. But this Act was repealed, 1690, c. 28.(t)

2. The Parliament of Scotland, as our court of the last Parliament of Scotland. resort, had the right of reviewing the sentences of all our supreme courts; particularly those of the Court of Session, (1-6, 20) against which parties have been early in use to protest for remedy of law to King and Parliament—Books S., Jan. 29, 1554-5, and March 7, 1561-2. The Court of Session in 1674 (founding their plea upon 1457, c. 62, joined with 1537, c. 39) disallowed this right, and procured an order of council for banishing all the advocates who would not disclaim the lawfulness of appeals to Parliament twelve miles from Edinburgh; but the Convention of Estates, 1689, c. 13, asserted it to be the right of every subject to protest for remedy of law against the sentences of the Session.(u)

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(s) But not, of course, to the effect of discussing the merits in the Court of Session; *Gordon*, 1802, M. 12,245.

(t) And by immemorial exercise of a jurisdiction conferred by the Sovereign, the established courts of law have now acquired a power of judging according to usage, exclusive of the Sovereign himself; *Inst.*, l. c.

(u) See *Forbes's Pref.* to *Journal of the Session*, in *Mor.*, vol. xx. p. 17 *et seq.*; *Robertson's App. Pref.*

Private Acts.

(i. 1, 39)

3. Private Acts, or ratifications of private grants by Parliament, as they passed of course without hearing those having interest, could not hurt the right of third parties; for which reason they are declared subject to reduction by the Court of Session; 1567, c. 18, No. 1. And all the sessions of our Scots Parliament downwards from James VI. were closed with an Act, saving the right of third parties.(v)

Parliament of Great Britain.

(7, 20)

4. By the Treaty of Union, 1707, c. 7, art. 3, the Parliaments of Scotland and England are united into one Parliament of Great Britain. From this period the British House of Peers, as coming in place of the Scots Parliament, is become our court of the last resort, to which appeals lie from all the supreme courts of Scotland: but that Court has no original jurisdiction in civil matters, in which they judge only upon appeal. By art. 22 of that treaty the Scots share of the representation in the House of Peers is fixed to sixteen Scots peers, elective; and in the House of Commons to forty-five commoners; of which thirty are elected by the freeholders of counties, and fifteen by the royal burghs. The principal Acts relating to the right of election are, 1681, c. 21; 1707, c. 8; 6 An. c. 6 and 23; 12 An. st. 1, c. 6; 2 Geo. II. c. 14; 7 Geo. II. c. 16; 16 Geo. II. c. 11.(w)

Scots representation in it.

Privy Council.

(9)

5. The King, although he might have determined all causes by himself, committed the regular exercise of that branch of his prerogative to his stated judges, as Justiciary,

(v) *Mackenzie v. Stewart*, 1752, M. 7445, 15,459. See Stephen's Com., i. 71, 622 *et seq.*; 2 Pat. Ap. 578. Formerly, all private Acts of Parliament founded upon in any litigation had to be specially set forth and pleaded; but by 13 & 14 Vict. c. 21, § 7, every Act passed after 4th Feb., 1851, is to be judicially taken notice of, unless it expressly provides to the contrary.

(w) To which may now be added 14 Geo. III. c. 81; 22 Geo. III. c. 41 and 45; 30 Geo. III. c. 17, § 4; 33 Geo. III. c. 64; 35 Geo. III. c. 65; 37 Geo. III. c. 138; 2 & 3 Will. IV. c. 65; 10 & 11 Vict. c. 52; 14 & 15 Vict. c. 87; 15 & 16 Vict. c. 35; 16 Vict. c. 28; 19 Vict. c. 58; 24 & 25 Vict. c. 83; 31 & 32 Vict. c. 48; 35 & 36 Vict. c. 33. The number of representatives for Scotland in the House of Commons is now sixty; thirty-two for counties, twenty-six for burghs, and two for universities.

Sheriffs, &c., except in certain particular trials, which parties were at liberty to bring either before the King and his council, or before the judge-ordinary—arg. 1425, c. 65, compared with 1457, c. 61. After the jurisdiction of the council was transferred from them to the Session, and from the Session to the judge-ordinary, in the manner to be explained next section, the judicial powers of the council seemed to be confined to questions which called for the more special attention of the public; 1487, c. 105. This council was styled the King's Secret or Privy Council, 1489, c. 12; 1609, c. 14—in contradistinction to the Parliament which was the great or general council, 1457, c. 75; 1537, c. 40; and it came at last, besides its powers in matters of state and government, to be vested with a fixed supreme jurisdiction in all questions that had a relation to the public peace. They inquired into and punished violent encroachments upon possession, and other grosser breaches of the peace; they decreed alimony to pupils, and to wives barbarously used by their husbands, and judged in many other questions of that sort where summary proceeding was necessary: but by 6 An. c. 6, the Scots privy council was abolished and sunk into that of Great Britain; which for the future is declared to have no other powers than the English privy council had at the time of the Union.(x)

6. A Court was erected by 1425, c. 65, consisting of *Session.* certain persons to be named by the King out of the Three *(10, 11)* Estates of Parliament, which was vested with the jurisdiction formerly lodged in the council; and it got the name of the *Session*, because, in place of being itinerant, and without any fixed terms of sitting, it was ordained to hold annually a certain number of sessions at the places to be specially appointed by the King. This court had a jurisdiction cumulative with the judge-ordinary, in spuilzies, and other possessory actions, and in debts; but they had no cognisance in questions of property of heritable subjects, 1457, c. 61. No appeal lay from its judgments to the Parliament, *ib.*

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(x) As to the powers of the British Privy Council, see Stephen's *Com.*, ii. 475, 478.

c. 62. The judges of this court served by rotation, and were changed from time to time, after having sat forty days, *ib.* c. 63; and became so negligent in the administration of justice, that it was thought necessary, first, to pass several acts, 1469, c. 27; 1475, c. 63, ordaining all causes to be pursued before the judges-ordinary, with a power to the parties aggrieved by the negligence or partiality of the judge to apply to the King and Council for justice and redress; and at last, by 1503, c. 58, to transfer the jurisdiction that had formerly been in the Session to a council to be named by the King, called a Daily Council.

Or College of  
Justice.

(12-14)

The judges  
thereof, by  
whom named.

7. The present model of the Court of Session, or College of Justice, was formed in the reign of James V. The Judges thereof, who are, by 1537, c. 36,<sup>(y)</sup> vested with a universal civil jurisdiction, consisted originally of seven churchmen, seven laymen, and a president, whom it behoved to be a prelate; arg. 1579, c. 93: And even after the Reformation, parsons, rectors, and other churchmen were received as judges. Parochial ministers were first disqualified for the office by 1584, c. 133. Afterwards, by 1640, c. 26, which extended the prohibition to all churchmen, the distinction of spiritual and temporal judges was suppressed; and though that Act was not renewed after the Restoration, no clergyman has been since that period admitted to the bench. The judges of Session have been always received by warrants from the Crown. His Majesty, 1579, c. 93, seems to have transferred to the court itself the right of choosing their own president; and in a sederunt, recorded 26th June, 1593, the King condescended to present to the Lords, upon every vacancy in the bench, a list of three persons, out of which they were to choose one; in which form Mr. John Preston of Fenton was admitted, March 8, 1595-6, and Mr. David Macgill of Cranston, May 23, 1597. But his Majesty soon resumed the exercise of both rights, which continued with the Crown till the usurpation, when it was ordained that the King should name the Judges of the Session by the advice of Parliament; 1641, c. 15. After the Restoration, the nomina-

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(y) This was really in 1532. See *Inst.*, i. 3, 12.

tion was again declared to be solely in the Sovereign; 1661, c. 2

8. Though judges may, in the general case, be named at the age of twenty-one years, the Lords of Session must be at least twenty-five; 1592, c. 132; by which statute other qualifications are also required to that office. By 1707, c. 7, art. 19, no person can be named Lord of Session who has not served as an advocate or principal clerk of session for five years, or as a writer to the signet for ten: and, in the case of a writer to the signet, he must undergo the ordinary trials upon the Roman law, and be found qualified two years before he can be named. Upon a vacancy in the bench, the King presents the successor by a letter addressed to the Lords, wherein he requires them to try and admit the person presented. The Lords, at the desire of Charles II., fixed the method of trial by Act S., 31st July, 1674. The powers given them to reject the presentee upon trial, 1579, c. 93, are taken away by 10 Geo. I. c. 19, and a bare liberty to remonstrate substituted in its place.<sup>(z)</sup>

9. Besides the fifteen ordinary judges, the King was allowed to name three or four Lords of his great council, who might sit and vote with them; 1537, c. 40. Upon a complaint made by the Court of Session, that the Crown had exceeded the fixed number of extraordinary Lords, James VI., by a letter, recorded Books S., 28th March, 1617, promised to restrict himself to four; which number was from that time never exceeded. By the said Act, 10 Geo. I., no vacancy happening thereafter through the death of any extraordinary Lord can be supplied. At the first institution, ten Lords with the President made a quorum; 1537, c. 57; but it appears from 1587, c. 44, that the practice prior to that statute had reduced the quorum to nine ordinary Lords.<sup>(a)</sup>

(z) *Haldane v. Faculty of Advocates*, Feb. 4, 1722, Rob. Ap. 422.

(a) By 43 Geo. III. c. 151, the Court was appointed to sit in two Divisions. By 50 Geo. III. c. 112, §§ 29 and 30, permanent Lords Ordinary were appointed. By 1 Will. IV. c. 69, § 20, the number of the Court was reduced to 13,—8 Inner House Judges, and 5 Lords Ordinary. Many minor changes in the constitution and arrangements of the Court have been made by other statutes, some of which have been noted *supra*.

Privileges of  
the College of  
Justice.

(17)

10. The appellation of the College of Justice is not confined to the judges, who are distinguished by the name of Senators, 1540, c. 93; but comprehends advocates, clerks of session, writers to the signet, and others, as described, Act S., 23rd Feb., 1678. Where, therefore, the College of Justice is entitled to any privilege, it extends to all the members of the college. Besides the privilege mentioned under the former title, § 14, they are exempted from watching, warding, and other services within borough, 1592, c. 153; and from the payment of ministers' stipends, and of all customs, &c., imposed upon goods carried to or from the city of Edinburgh, said Act S.(b)

Jurisdiction of  
the Session in  
crimes;

(21)

11. Though the jurisdiction of the Session be properly limited to civil causes, 1537, c. 36; the judges have always sustained themselves as competent to the crime of falsehood, either from its necessary connection with civil right, or perhaps because the summary proceedings of the Court of Justiciary were not well adapted to the tedious proof frequently brought in improbation, when pursued in an indirect manner. Where the falsehood is alleviated by favourable circumstances, the judges themselves inflict the punishment by imprisonment, fine, &c.; but where it deserves death or demembration, they, after finding the crime proved, remit the criminal to the Court of Justiciary.(c) Special statute has given to the Court of Session jurisdiction in contravention of lawburrows, deforcements, and breach of arrestments; 1581, c. 117, 118. And they have been in use to judge in battery *pendente lite*, and in usury,(d) though statute seems to have excluded them; 1594, c. 219; 1597, c. 247.

in civil causes.

(18, 22)

12. In certain civil causes the jurisdiction of the Session is exclusive of all inferior jurisdictions; as in declarators of

(b) See *Coll. of Justice v. Town of Edinr.*, 1687, M. 2402; *Mags. of Edinr. v. Coll. of Justice*, 1790, M. 2418, 3 Pat. Ap. 155. None of these exemptions now exist. See 8 & 9 Vict. c. 83, § 50; and 31 & 32 Vict. c. 100.

(c) In modern practice forgery is not prosecuted *criminally* in the Court of Session, but before the Court of Justiciary. Proceedings before the Court of Session in cases of forgery are merely *ad civilem effectum*, to set aside the forged writing. See Hume's Com., i. 162.

(d) The usury laws are abolished by 17 & 18 Vict. c. 90.

property, and other competitions of heritable rights, provings of the tenor, *cessiones bonorum*, restitution of minors, reductions of decrees or of writings, sales of the estates of minors or bankrupts, &c. (e) In a second class of causes, their jurisdiction can be only exercised in the way of review, after the cause is brought from the inferior court, as in maritime and consistorial causes, which must be pursued in the first instance before the admiral or commissary; (f) and in actions below two hundred merks, which must be commenced before the judge-ordinary, 1672, c. 16, § 16, *concerning the Session*. In all civil actions which fall under neither of these classes, the jurisdiction of the Session is concurrent, even in the first instance, with that of the judge-ordinary. The Session may proceed as a court of equity, by the rules of conscience, in abating the rigour of law, and giving aid in proper cases to such as in a court of law can have no remedy: And this power is inherent in the supreme court of every country, where separate courts are not established for law and for equity. The Session is a court of equity.

13. The supreme criminal judge was styled the Justiciar, Justiciar. and he had anciently an universal civil jurisdiction, even in matters of heritage; *R. M.*, L. 1, c. 5, §§ 3, 4; L. 2, c. 16, § 37. He was obliged to hold two justice courts or ayres yearly, at Edinburgh or Peebles, where all the freeholders of the kingdom were obliged to attend; *Q. Att.*, c. 79. Besides this universal court, special justice-ayres were held in all the different shires in the kingdom twice in the year; *Stat. R. III.*, c. 30; 1440, c. 5, &c. These last having gone into disuse, his Majesty was authorised (1587, c. 81), either by himself or his justice-general, to name eight deputies, two for every quarter of the kingdom, who should make their circuits over the whole in April and October. (24, 25)

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(e) It will be seen from t. iv. § 2, note, in how few of these matters the jurisdiction of the Court of Session is now exclusive.

(f) The limit in value is now £25; 50 Geo. III. c. 112; 16 & 17 Vict. c. 80, § 22. Poidings, sequestrations for rent, and removings under the A. of S., 1756, necessarily, and in practice petitions to arrest as *in meditatione fugæ*, begin before the sheriff. In these cases now the Session has original jurisdiction, see t. iii. 18, note, *infra*.

Court of  
Justiciary.

(26)

14. The office of deputies was suppressed by 1672, c. 16 ; and five Lords of Session were added, as Commissioners of Justiciary to the Justice-General and Justice-Clerk. The Justice-General, if present, is constant president of the court, and in his absence the Justice-Clerk. This statute divides the kingdom into three districts, and appoints two of the judges of the new-erected court to hold circuits in certain boroughs of each district, once a-year, in May. Soon after the Union, circuit courts were appointed to be held twice in the year by 6 An. c. 6. Afterwards they were, by 10 An. c. 23, brought back to the regulation of 1672 ; and now again, by the late Jurisdiction Act, 20 Geo. II., they are to be held twice in the year, (g) with a power to his Majesty to add to, or alter the places or districts at which these courts are to be held, and appoint their times of meeting. (h) One judge may, by the last quoted statute, proceed to business in the absence of his colleague. (i)

Jurisdiction of  
Justiciary.

(27)

15. By St. Al. II. c. 14, § 2, the crimes of robbery, rape, murder, and wilful fire-raising (the four pleas of the Crown), are said to be reserved to the King's Court of Justiciary ; (j) but the only crime in which, *de praxi*, the jurisdiction of justiciary became at last exclusive of all inferior criminal jurisdiction, was that of high treason ; *Mack. Crim. tit. Jurisd. of Reg.* Treason is, since the Union, triable, not only by the justiciary, but by special commission of *oyer and terminer*, in which three of the Lords of Justiciary must be named, whereof one to be of the quorum, 7 An. c. 21. The Court of Justiciary, when sitting at Edinburgh, has a power of advocating causes from all inferior criminal judges, and of suspending their sentences. Formerly the Court of Session assumed the power of advocating criminal causes from inferior courts, not only on incompetency, but iniquity, in order again to remit them to the proper judge. But the

(g) There is also a winter circuit at Glasgow ; 9 Geo. IV. c. 29, § 1.

(h) See also 9 Geo. IV. c. 29, § 3 ; 27 & 28 Vict. c. 30, § 1.

(i) Or the two may sit at the same time in different courts, or in different towns on the same circuit ; 31 & 32 Vict. c. 95.

(j) They are so in practice.

Session has not interposed in such advocations since the justiciary was new modelled by statute 1672.(k)

16. The Circuit Court has, by the late Jurisdiction Act, a <sup>New powers of the Circuit.</sup> power given them to judge in all criminal causes which do not infer death or demembration, upon appeal from any inferior court within their district. By the same statute, a supreme civil jurisdiction is also given to them, by way of appeal, in all causes not exceeding £12 sterling, in which their decrees are not subject to review; but no appeal is to lie to the circuit till the cause be finally determined in the inferior court. This last branch of the Act was only temporary, but is now made perpetual by 31 Geo. II. c. ult.(l) (28)

17. The Scots Court of Exchequer, as the King's chamberlain-court, judged in all questions of the revenue. By 6 An. c. 26 (passed in pursuance of 1707, c. 7, art. 19), that court is abolished, and a new court erected, consisting of the Lord High Treasurer of Great Britain, and a Chief Baron, with four other Barons of Exchequer; which barons are to be made of serjeants-at-law, English barristers, or Scots advocates of five years' standing. All the privileges belonging to the College of Justice are communicated to the barons and other members of this court, and the counsel entitled to practise in it are such as can practise before the Courts of Westminster or the Court of Session. This court has a privative jurisdiction conferred upon it, as to the duties of customs, excise, or other revenues appertaining to the King or Prince of Scotland, and as to all honours and estates that may accrue to the Crown; in which matters, they are to judge <sup>Exchequer.</sup> (30)

(k) See *Berry v. Walker and Roger*, 17 Jan. 1809, 15 F.C. 79; see *supra*, i. 2, 57.

(l) This civil appellate jurisdiction is taken away by 16 & 17 Vict. c. 80, § 22, so far as regards cases originating in sheriff-courts. But it seems that such cases may still be appealed to the Circuit Court upon questions of jurisdiction; see *Dick v. G. N. of So. Ry. Co.*, 3 Irv. 616; and there is a similar appeal in actions under the Debts Recovery Act, 30 & 31 Vict. c. 97, § 17; *Stewart*, 23 Sept. 1868, 40 S. J. 654. Under 1 Vict. c. 41 (Sheriff Small-Debt Act), there is a limited right of appeal to the Circuit Court, which is not taken away; *Aitken v. Learmont*, 1 Irv. 151; and under various special statutes there is a similar power of review by the High Court or the Circuit Court of Justiciary.

by the forms of proceeding used in the English Court of Exchequer, under the following limitations: that no debt due to the Crown shall affect the debtor's real estate in any other manner than such estate may be affected by the laws of Scotland—(see *Burnet's Crs. v. Murray*, 1754, M. 7873; aff. 1 Cr. St. and P. 594)—and that the validity of the Crown's titles to any honours or lands shall continue to be tried by the Court of Session. The barons have the powers of the Scots court transferred to them, of passing the accounts of sheriffs, or other officers who have the execution of writs issuing from or returnable to the Court of Exchequer, and of receiving resignations, and passing signatures of charters, gifts of casualties, &c.(m) But though all these must pass in Exchequer, it is the Court of Session only who can judge of their preference after they are completed; 1661, c. 59. See *Stair's Decis.*, June 14, 1665, M. 7408.(n)

Admiral, his  
jurisdiction;

(33-35)

criminal,

and civil.

18. The jurisdiction of the Admiralty in maritime causes was, of old, concurrent with that of the Session. It has the title of Sovereign given to it by 1609, c. 15, and is much enlarged by 1681, c. 16, whereby the high-admiral is declared the King's Justice-General upon the seas, on fresh water within the flood-mark, and in all harbours and creeks. His civil jurisdiction extends, by this statute, to all maritime causes, and so comprehends questions of charter-parties, freights, salvages, bottomries, &c. He exercises his supreme jurisdiction by a delegate, the Judge of the High Court of Admiralty; and he may also name inferior deputes, whose jurisdiction is limited to particular districts, and whose sentences are subject to the review of the High Court. In causes which are declared to fall under the Admiral's cognisance, his jurisdiction is sole; insomuch, that the Session itself, though they may review his decrees by suspension

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(m) As to the transfer of some of their powers to the Commissioners of the Treasury, see 3 & 4 Will. IV. c. 13.

(n) The Act 19 & 20 Vict. c. 56, constitutes the Court of Session the Court of Exchequer in Scotland, and regulates procedure in Exchequer causes, which are now conducted as ordinary civil actions. As to the writ of extent, now abolished, and the Crown's rights against its debtor's estates, see *Bell's Com.*, ii. 41 *et seq.* (ed. Shaw, 620 *et seq.*)

or reduction, cannot carry a maritime question from him by advocacy: yet the Session may advocate causes from inferior admiralties, in order to remit them to the Judge of the High Court. The Admiral has acquired by usage a jurisdiction in mercantile causes even where they are not strictly maritime, cumulative with that of the judge-ordinary; *Turnbull v. Anderson*, July 19, 1706, M. 1460. The jurisdiction of the Commissaries of Edinburgh, which is as properly supreme as that of the High Admiral, is explained below; i 5, § 24, 25.(o)

19. All our supreme courts have seals or signets, proper Seals of Court,  
(39) to their several jurisdictions. The Courts of Session and Justiciary used formerly the same signet, which was called the King's, because the writs issuing from thence run in the King's name; and though the Justiciary got at last a separate signet for itself, yet that of the Session still retains the appellation of the *King's Signet*. In this office are sealed summonses for citation, letters of executorial diligence, or for staying or prohibiting of diligence, and generally whatever passes by the warrant of the Session, and is to be executed by the officers of the court. All these must, before sealing, be signed by the *writers*, or (as they are called in our ancient statutes, 1537, c. 50 *et seq.*) *clerks* of the signet: (p) but letters of diligence, where they are granted in a depending process merely for probation, though they pass by the signet, must be subscribed by a clerk of Session. The clerks of the signet also prepare and subscribe all signatures of charters, or other

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(o) By 6 Geo. IV. c. 120, § 57, all jurisdiction in prize was vested in the High Court of Admiralty of England; and in 1830 the Scotch Admiralty Court was abolished, its civil jurisdiction above £25 being transferred to the Court of Session, and in cases of less amount to the sheriff-courts; 1 Will. IV. c. 69, § 21-29; 1 & 2 Vict. c. 119, § 21. The criminal jurisdiction of the Admiralty Court was in like manner divided between the sheriff and the Court of Justiciary, which had before cumulative jurisdiction with the Court of Admiralty; *Ib.* Proper consistorial actions are only competent before the Court of Session; the summons may be signed by a writer to the signet; 1 Will. IV. c. 69, § 33; 13 & 14 Vict. c. 36, § 16; 6 & 7 Will. IV. c. 41; 24 & 25 Vict. c. 86. See ii. 5, § 27, note.

(p) See 1 & 2 Vict. c. 114; 31 & 32 Vict. c. 100, § 13.

royal grants, which pass in Exchequer. An account of the several seals under which grants by the Crown ought to pass shall be given below ; ii. § 38 *et seq.*

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TIT. IV.—OF THE INFERIOR JUDGES AND COURTS OF  
SCOTLAND.

Sheriff,  
(i. 2)

his jurisdic-  
tion ;

as it stood  
anciently ;

as it stands at  
present.

(3, 4)

1. Sheriff (from *reeve*, governor, and *sheer*, to cut or divide) is the judge-ordinary constituted by the Crown over a particular division or county. Our Kings sometimes erected certain lands, which were only parts of a county, and at other times royal boroughs, with the jurisdiction of sheriffship within themselves ; in which case the judge of the privileged territory had a jurisdiction cumulative with the jurisdiction of the Sheriff of that county within which it was locally situated. The Sheriff's jurisdiction, both civil and criminal, was in ancient times nearly as ample within his own territory as that of the Supreme Courts of Session and Justiciary was over the whole kingdom ; for he received in his court the four pleas of the Crown, murder, robbery, rape, and fire-raising, when authorised by the Justiciar (St. Gul. c. 2, § 5), and he judged in declarators of property or pleas of right, and in other questions of the greatest importance ; R. M. l. 1, c. 3 et 5. And, even after his jurisdiction came to be more limited, it retained for some time this mark of supreme, that causes were carried for review from the baron-courts of subject-superiors to the sheriff-court, as the King's baron-court, 1503, c. 95.

2. The Sheriff to this day judges in all actions upon contracts, or other personal obligations, to the greatest extent, whether the suit be brought against the debtor himself or against his representative, in forthcomings, in poindings of the ground, in mails and duties, and in all possessory actions, as removings, ejections, spuilzies, &c. ; in all brieves issuing from the Chancery, as of inquest, (q) *terce*, division,

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(q) Brieves of inquest were formerly issued for services of heirs, which now proceed on petition to the Sheriff ; 10 & 11 Vict. c. 47 & 51, now

tutory, &c. ; and even adjudications of land-estates, when proceeding on the renunciation of the apparent heir.(r) His present criminal jurisdiction extends to certain capital crimes, as theft, and even murder, though it be one of the pleas of the Crown, 1426, c. 91 ; 1491, c. 28 ;(s) and he is competent to most questions of public police, and has a cumulative jurisdiction with justices of the peace in all riots and breaches of the peace.

3. Sheriffs have a ministerial power, in virtue of which they were anciently employed in sending written copies of the law to prelates, barons, and boroughs, before the art of printing, 1425, c. 67 ; and to this day they return juries in order to the trial of causes that require juries. The writs for electing Members of Parliament have been since the Union directed to the Sheriffs ; who, after they are executed,

His ministerial powers.

(6)

31 & 32 Vict. c. 101, § 27. Brieves for the cognition of insane persons are now directed to the Lord President of the Court of Session, instead of the Sheriff ; 31 & 32 Vict. c. 100, § 101 ; A. of S., Dec. 3, 1868.

(r) The jurisdiction of Sheriffs is extended to all proceedings relative to questions of nuisance or damages arising from the alleged undue exercise of rights of property, and to questions " touching either the constitution or the exercise of real or predial servitudes ; " 1 & 2 Vict. c. 119, § 15 ; to actions for arrears of feu-duty of subjects under £25 in value to the effect of a decree of irritancy *ob non solutum canonem* ; subject to a remedy by declarator in the Court of Session within a year, on the ground of defect in the superior's title ; 16 & 17 Vict. c. 80, § 32. By 40 & 41 Vict. c. 50, it has been extended to all questions of heritable right and title—except adjudications (unless in so far as formerly competent, and reductions, see *infra*, ii. 12, 21)—and also to actions of division of commony, and division, and division and sale, of common property, where the value of the subject in dispute does not exceed £50 by the year, or £1000. See as to the jurisdiction of Sheriffs in admiralty cases, *sup.* i. iii. 18, note (o) ; over foreigners, 40 & 41 Vict. c. 41, § 10, and i. ii. § 11, note (d), and in processes of *cessio bonorum*, 6 & 7 Will. IV. c. 56, &c. See also *infra*, iv. § 26, note.

(s) The Sheriff is not competent to try any of the four " pleas of the Crown," viz., murder, robbery, rape, and fire-raising. He can only try crimes " inferring an arbitrary punishment." As he cannot sentence to penal servitude, and as imprisonment is not in practice awarded for more than two years, his ordinary jurisdiction, where the trial is before a jury, is practically limited to crimes for which this is considered a sufficiently severe sentence. In summary prosecutions he may inflict a sentence of imprisonment for sixty days, or a fine of £10 ; 9 Geo. IV. c. 29. In many kinds of offences his powers are defined by particular statutes.

return them to the crown-office from whence they issued. They also execute writs issuing from the Court of Exchequer; and in general take care of all estates, duties, or casualties that fall to the Crown within their territory, for which they must account to the Exchequer.(t)

Lord of Regality;

(7, 8)

his right of repledging;

his right to the single escheat of delinquents

(4.) A *Lord of Regality* was a magistrate who had a grant of lands from the Sovereign, with royal jurisdiction annexed thereto. No lands could be comprehended under this grant which did not belong, either in property or superiority, to the grantee. His civil jurisdiction was equal to that of a sheriff; his criminal extended to the four pleas of the Crown; for it was equal to that of the Justiciary as to every crime except treason; Mack. (Crim. Jurisd. of Regal.) ii. 11, §§ 1, 5. He had a right to repledge or reclaim all criminals subject to his jurisdiction, from any other competent court, though it were the Justiciary itself, to his own; at least till 1672, c. 16. He who used this right was obliged to give caution to the court from whom the criminal was repledged that justice should be administered by himself; in which, if he failed, he forfeited his rights of holding courts for a year, and the first judge might again take up the cause, and if the delinquent did not appear, the cautioner or security was to answer for him; Q. Att. c. 8, §§ 6, 7. He had also right, according to the most common opinion, to the single escheat of all denounced persons residing within his jurisdiction, even though such privilege had not been expressed in the grant of regality. As this ample jurisdiction was attended with too great power and influence, a stop was put to further grants of regality without consent of Parliament, by 1455, c. 43; notwithstanding which, our Sovereigns continued to make new grants, that, for the greatest part, were either confirmed by ratifications of Parliament or fortified by the immemorial exercise of the jurisdiction.

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(t) They have ministerial powers conferred by special statutes in regard to nuisance, poor-law, lunacy, representation of the people, orders of protection of deserted wives, as to which last see *inf.* i., vi. 13 note (n). They can appoint factors *loco tutoris* and curators *bonis* on estates the yearly value of which does not exceed £100. See 43 & 44 Vict. c. 4.

5. The *Stewart* was the magistrate appointed by the *Stewart* King over such regality lands as happened to fall to the Crown by forfeiture, &c.; and therefore the stewart's jurisdiction was equal to that of a regality. The two stewartries of Kirkcudbright and of Orkney and Zetland make shires or counties by themselves, and send each a representative to Parliament. Where lands not erected into a regality fell into the King's hands, he appointed a *Bailie* over them, *Bailie*, whose jurisdiction was equal to that of a sheriff. (10)

6. By the late Jurisdiction Act, 20 Geo. II. c. 43, all heritable regalities and baileries, and all such heritable sheriffships and stewartries as were only parts of a shire, are dissolved; and the powers formerly vested in them are made to devolve upon such of the King's courts as these powers would have belonged to if the jurisdictions dissolved had never been granted. All sheriffships and stewartries that were no parts of a shire, where they had been granted either heritably or for life, are resumed and annexed to the Crown. No high sheriff or stewart can hereafter judge personally in any cause. One sheriff or stewart-depute is to be appointed by the King in every shire, who must be an advocate of three years' standing; and after a certain term, not yet expired, (u) all commissions to these deputies are to be granted for life. (11)

7. Formerly the jurisdiction of sheriff must have been exercised at the head borough of the shire; but, by the foregoing Act, sheriffs and stewarts-depute have a power to name a substitute or substitutes during pleasure, either over the whole shire, or within such a particular district as shall be mentioned in the substitution; (v) and they may hold courts at any place within the shire, upon previous notice, to be published at the several churches within the district where the court is to be held. After this statute, several diligences continued to be executed at the head boroughs of regalities and stewartries, though there could not possibly be any record

Sheriffs may hold courts anywhere within the shire;

but diligences must be published at the head borough.

(u) By 28 Geo. II. c. 7, Sheriffs hold their commissions *ad vitam aut culpam*.

(v) The commissions of all sheriff-substitutes now issue from the Crown, and extend over the whole district subject to the jurisdiction of the sheriff.

kept in these abolished jurisdictions, in which diligences might be registered; such executions were therefore prohibited by Act S., Feb. 29, 1752. No sheriff could have sat by our former law during the vacation of the Session without a dispensation from the Lords, until Michaelmas head-court, which was considered as the beginning of the sheriffs' session; but by this statute, sheriffs-depute and their substitutes may sit at all times, and in all causes, without dispensation.(w)

Prince of  
Scotland.

(12)

8. The appanage or patrimony of the Prince of Scotland has long been erected into a regality jurisdiction, called the Principality. It is personal to the King's eldest son, upon whose death or succession it returns to the Crown. The Prince has, or may have, his own chancery, from which his writs issue, and may name his own chamberlain and other officers for receiving and managing his revenue. The vassals of the Prince are entitled to elect, or to be elected, Members of Parliament for counties, equally with those who hold of the Crown.(x)

Justices of the  
Peace.

(13)

The extent of  
their present  
jurisdiction.

(14)

9. *Justices of the Peace* are magistrates named by the Sovereign over the several counties of the kingdom, for the special purpose of preserving the public peace. Their power by 1609, c. 7, reached little farther than to bind over disorderly persons for their appearance before the Privy Council or Justiciary; but by 1717, c. 8, and 1661, c. 38, they are specially directed to judge in breaches of the peace, and in most of the laws concerning public policy. They may compel workmen or labourers to serve for a reasonable fee,(y) and they can condemn masters in the wages due to their servants, which is the only point of civil jurisdiction given them by these statutes.(z) By 1669, c. 16, they have power

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(w) The sessions of sheriff-courts are now regulated by 16 & 17 Vict. c. 80.

(x) *I.e.*, Were so entitled as freeholders under the old election law.

(y) Repealed by 53 Geo. III. c. 40. A special *quasi* criminal jurisdiction in disputes between masters and servants in certain trades was exercised by Justices of Peace under 4 Geo. IV. c. 34. This is materially altered by 30 & 31 Vict. c. 141, and by the legislation of 1875, 38 & 39 Vict. c. 86.

(z) In questions of this kind justices have jurisdiction to any amount, but the procedure must be by written pleadings in the forms observed in

to judge in questions of highways, which must be twenty feet broad at least, excluding the ditches on both sides; to call out the tenants, with their cottars and servants, to perform six days' work yearly for upholding them; and, in conjunction with the heritors, to assess the shire in the sum necessary for that purpose, and for building and repairing bridges, not exceeding 10s. upon every £100 Scots of valuation; part of which may be applied, where a highway is to be made upon new ground, to compensate the loss of the proprietor through whose ground the new road is to be carried. But the Commissioners of Supply are now joined with the Justices in that part of their jurisdiction, 5 Geo. I. c. 30.(a)

10. To prevent collision between Justices of the Peace and other judges, they are enjoined not to cite any party to their court till fifteen days are expired from his committing the offence.(b) The Act 1661 ordains them to meet four times in the year, with power to continue or adjourn these quarterly meetings to such day and place as shall be most convenient; but they hold common courts at any time, and in any place within the shire, though not by way of adjournment of the quarter-sessions. In the quarter-sessions, which are always held at the head borough of the county, the justices have, in the common case, been in use of reviewing the sentences pronounced in their intermediate meetings, which are frequently called special sessions. *Constables* are the proper officers for executing their orders. They have powers, by the Act above cited, to suppress tumults with

Their powers  
of holding  
courts.

(15)

Constables.

(16)

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inferior courts before 1853, and neither in those provided for sheriff-courts by 16 & 17 Vict. c. 80 (*Hebenton v. Milne*, Nov. 17, 1868, 7 Macph. 112), nor in the summary form prescribed by the Justice of Peace Small Debt Act, 6 Geo. IV. c. 48, for "causes and complaints concerning the recovery of debts or the making effectual any demand" not exceeding £5. See also 12 & 13 Vict. c. 34.

(a) The Acts in regard to highways here referred to are repealed by the General Turnpike Act, 1 & 2 Will. IV. c. 43, and the Statute Service Act, 8 & 9 Vict. c. 41. The regulating Statute now is 41 & 42 Vict. c. 51, the Roads and Bridges (Scotland) Act, 1878. An important function of Justices in counties now consists in granting licenses to public-houses, under 9 Geo. IV. c. 58, 16 & 17 Vict. c. 67, and 39 & 40 Vict. c. 26, &c.

(b) See note at end of § 11.

the assistance of the neighbourhood; and to apprehend delinquents, and those who can give no good account of themselves, and carry them to the next Justice.(c) Any one Justice may, by proper warrants of commitment, imprison delinquents in order to trial, or, by a warrant to a constable, ordain suspected houses to be searched, and suspected persons to be brought before him, in order to their examination, or to give security for their good behaviour.

The powers of  
Justices since  
the Union.

(18)

11. By 6 An. c. 6, our Justices of the Peace, over and above the powers committed to them by the laws of Scotland, are authorised to exercise whatever belonged to the office of an English Justice of the Peace, in relation to the public peace.(d) From that time, the Scots and the English commissions have run in the same style, which contain powers to inquire into and judge in all capital crimes, witchcrafts, felonies, and several others specially enumerated, with this limitation subjoined, *of which Justices of the Peace may lawfully inquire*. But in cases of difficulty they shall not proceed unless one of the King's Judges be present; which, when applied to our law, must signify one of the Lords of Justiciary. These commissions bear that two Justices shall make a quorum in the trial of crimes, &c. And therefore, though by the laws of Scotland three were required, and though, by the above-quoted Act, 6 An., the forms of trial were to continue as formerly, two Justices can now constitute a court; *Reid v. Finlaysons*, Dec. 1730, M. 7636.(e) Special statute has given the cognisance of several matters of excise to the Justices, in which their sentences are final. See *Pater-son v. Ramsay*, Jan. 25, 1710, M. 7594.(f)

Two Justices  
make a  
quorum.

(19)

(c) The Commissioners of Supply are now required to provide a police force in counties; 20 & 21 Vict. c. 72. The Burgh Police Act is 25 & 26 Vict. c. 101; but some towns are under earlier general acts adopted previous to 1862.

(d) They may take affidavits even in England; *Kerr v. M. of Ailsa*, June 12, 1854, 1 Macq. 736.

(e) By 19 & 20 Vict. c. 48, the forms applicable to the criminal jurisdiction of Justices were assimilated to those of the Sheriff's Summary Court under 9 Geo. IV. c. 29, and 11 Geo. IV. c. 37. But the proceedings may now be in the forms prescribed by 27 & 28 Vict. c. 53 (Summary Procedure Act).

(f) The rule seems to be that there is no appeal, even to quarter-

12. A *borough* is a body corporate, made up of the inhabitants of a certain tract of ground erected by the Sovereign, with jurisdiction annexed to it. Boroughs are erected either *Boroughs.* to be holden of the Sovereign himself, which is the general *(20, 21)* case of royal boroughs, or of the superior of the lands erected as boroughs of regality and barony. Boroughs-royal have power by their charters to choose annually certain office-bearers or magistrates; and in boroughs of regality and barony the nomination of magistrates is, by their charter, lodged sometimes in the inhabitants, sometimes in the superior. Bailies of boroughs have jurisdiction in matters of debt, services, and questions of possession betwixt the inhabitants. Their criminal jurisdiction extends to petty riots and, by special statute, to reckless (not intended) fire-raising; 1426, c. 75. Boroughs-royal had anciently the same privilege with regalities of repledging from the justiciary or sheriff; for which see L. B., c. 61, § 1, and 1488, c. 1. The *Dean of Guild* is that magistrate of a royal borough who is head of *Dean of Guild.* the merchant company; he has the cognisance of mercantile *(24 and ii. 9. 9)* causes within borough, 1593, c. 184, (g) and the inspection of buildings, that they encroach neither on private property nor on the public streets; and he may direct insufficient houses to be pulled down. His jurisdiction has no dependence on the court of the borough or bailie court; *Adamson v. Paterson*, July 21, 1631, M. 7483. By the late Jurisdiction Act, all jurisdiction competent to any borough of regality or barony, or magistrates thereof, which is independent of the lord of regality or barony, is reserved entire; but their privilege of repledging from the sheriff and Stewart courts is taken away. (h)

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sessions, from the decision of Justices in matters of excise, unless it is expressly given by statute; *Ogilvie v. Mollyson*, 1798, M. 7631; see *Evans v. M'Loughlan*, Feb. 18, 1859, 21 D. 532; rev. Feb. 21, 1861, 4 Macq. 89. By 7 & 8 Geo. IV. c. 53, § 84, Justices in quarter-sessions may, in their discretion, state the facts of any excise prosecution for the opinion and direction of the Court of Session.

(g) This jurisdiction is not now exercised. Inst., l. c.

(h) The election of magistrates and council is now regulated in royal burghs by 3 & 4 Will. IV. c. 76; 4 & 5 Will. IV. c. 87; and 15 & 16 Vict. c. 77; 4 & 5 Will. IV. c. 86; 31 & 32 Vict. c. 108; 33 &

Barons.

(l. 3. 3)

*Barons majores et minores.*

Lesser Barons excluded from Parliament if not elected.

Their jurisdiction;

(25)

civil,

and criminal;

(26)

13. A *Baron*, in the large sense of that word, is one who holds his lands immediately of the Crown; and as such had, by our ancient constitution, right to a seat in Parliament, however small his freehold might have been. When titles of honour and dignity came to be conferred by the Sovereign, the Barons that were distinguished by these had the appellation of *Majores*. By 1427, c. 101, the lesser Barons were exempted from the burden of attending the service of Parliament, provided that commissioners were sent from the Barons of each county to represent them. This exemption, which was renewed under certain restrictions by 1427, c. 75, and 1503, c. 78, grew insensibly in less than a century into an utter disability in all the lesser Barons from sitting in Parliament without election by the county, though no statute is to be found expressly excluding them; see 1587, c. 114.

14. To constitute a baron in the strict law sense, his lands must have been erected, or at least confirmed, by the King in *liberam baroniam*; and such Baron had a certain jurisdiction, both civil and criminal, which he might have exercised, either in his own person or by his bailie; but where he himself was a party, he could not judge in person. In civil matters he might have judged in questions of debt within the barony, and in most of the possessory actions; he had also a power of police by which he could fix reasonable prices on work, &c.; and he was competent to every question necessary for making his own rents effectual. His criminal jurisdiction extended anciently to all crimes except treason and the four pleas of the Crown, robbery, murder, rape, and fire-raising; Leg. Malc. ii. c. 13. He might, by our later practice, have judged in reckless fire-raising, 1426, c. 75; in penal statutes, *Strowan v. Cameron*, Feb. 3, 1674, M. 7541; and in riots and bloodwits: and in the general opinion of lawyers, every Baron, as such, could have punished the crime

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34 Vict. c. 92; 35 & 36 Vict. 33. The police regulations and jurisdiction of burghs and populous places are now generally regulated either by local Acts or by the general Police Acts, which the inhabitants have power to adopt; 3 & 4 Will. IV. c. 46; 10 & 11 Vict. c. 39; 13 & 14 Vict. c. 33; 25 & 26 Vict. c. 101.

of theft capitally; Craig, 105, i. 12, § 16; Skene, de verb. sig., *voce* Baron—Hope, Min. Pr. 93.

15. By the late Jurisdiction Act the civil jurisdiction of a Baron is reduced to the power of recovering from his vassals and tenants the rents of his lands, and of condemning them in mill-services; and of judging in causes where the debt and damages do not exceed 40s. sterling. His criminal jurisdiction is, by the same statute, limited to assaults, batteries, and other smaller offences, which may be punished by a fine not exceeding 20s. sterling, or by setting the offender in the stocks in the day-time not above three hours; the fine to be levied by poinding, or one month's imprisonment. The jurisdiction formerly competent to proprietors of mines, and coal or salt works, over their workmen, is reserved; (i) and also that which was competent to proprietors who had the right of fairs or markets, for correcting the disorders that might happen during their continuance; provided they shall exercise no jurisdiction inferring the loss of life or demembration. No charter to be hereafter granted for erecting lands into a barony is to convey any greater jurisdiction than for recovery of rents and for mill-services; which is a right that every proprietor, though neither Baron nor infeft *cum curiis*, was understood to have by our former law. (j) The jurisdiction of sheriffship, stewartry, and barony had certain stated head courts yearly, at which all the vassals subject to the jurisdiction were obliged to attend; but this obligation is taken off by the Act 19 Geo. II. c. 50, for abolishing tenures by ward-holding.

How restricted  
by 20 Geo. II.  
c. 43.

(28)

(29)

How future  
erectons are  
restricted.

Attendance at  
head courts  
abolished.

(i) The servitude of colliers and salters was abolished by 15 Geo. III. c. 28, and 39 Geo. III. c. 55. See *infra*, i. 7, 39.

(j) By statute 35 Geo. III. c. 122, June 26, 1795, the Sovereign is authorised to erect free and independent burghs of barony in those parts of the sea-coasts in which the fisheries are carried on, in the usual manner practised before the 20 Geo. II. The magistrates in such burghs are to exercise the powers of justices cumulatively with the justices of the county. The restrictions on baronial jurisdiction amount to a prohibition. Inst., l. c. The General Police Act (25 & 26 Vict. c. 101) provides for populous places being made into quasi-burghs, and also for bringing burghs of barony and burghs of regality under its operation. See also 33 & 34 Vict. c. 37.

Constabularies.

(i. 3, 37)

16. The *High Constable of Scotland* had no fixed territorial jurisdiction, but followed the Court; and had, jointly with the Marischal, the cognisance of all crimes committed within two leagues of it; Leg. Malc. II. c. 6. All other constabularies were dependent on him. These had castles, and sometimes boroughs subject to their jurisdiction, as Dundee, Montrose, &c.; and amongst other powers now little known they had the right of exercising criminal jurisdiction within their respective territories during the continuance of fairs; *E. Kinghorn v. Town of Forfar*, July 18, 1676, M. 13,100. By the late Jurisdiction Act (20 Geo. II. c. 43), all jurisdictions of constabulary are dissolved except that of High Constable.

Lyon King-of-Arms.

(32, 33)

17. The office of the *Lyon King of Arms* was chiefly ministerial—to denounce war, proclaim peace, carry public messages, &c. But he has also a right of jurisdiction, 1592, c. 127, whereby he can punish all who usurp arms contrary to the law of arms, and deprive or suspend messengers, heralds, or pursuivants (who are officers named by himself); but he has no cognisance of the damage arising to the private party through the messenger's fault, *Heriots v. Fleming*, June 27, 1673, M. 7649.(k) *Messengers*, anciently called *officers-at-arms*, were first brought under regulations by 1587, c. 46. They are subservient to the supreme Courts of Session and Justiciary; and their proper business is to execute all the King's letters, either in civil or criminal causes.(l)

Messengers-at-Arms.

Sentence-money.

(37)

18. Our judges had for a long time no other salaries or appointments than what arose from the sentences they pronounced. Our criminal judges applied to their own use the fines or issues of their several courts; and regalities had a right to the single escheat of all persons denounced who resided within their jurisdiction. A small sum was allowed to our supreme civil court upon every decree, by 1458, c. 63;

(k) The court and office of the Lord Lyon are now regulated by 30 Vict. c. 17.

(l) Services and citations in the Court of Session may now be made by sheriff-officers on parties residing in any county or sheriff-substitute's district in which there is no resident messenger-at-arms, or in any island of Scotland; 31 & 32 Vict. c. 100, § 19. *Schweitzer*, Oct. 27, 1867, 7 Macph. 24.

and afterwards, the twentieth part also of the sums decreed, 1587, c. 43; and it was not till after certain yearly provisions were settled on the Lords (for which see 1609, c. 11, and 1633, c. 22), that sentence-money was prohibited, 1641, c. 55, which has never since been exacted, 1661, c. 50. Sheriffs were likewise entitled to the twentieth part of the Sheriff-fee, sum contained in every decree, in name of Sheriff-fee,<sup>(m)</sup> (38) both proper sheriffs, 1491, c. 30, and messengers, when invested with the power of sheriffs, 1503, c. 66; but, by the late Jurisdiction Act, fixed salaries were settled upon sheriffs-depute in place thereof. Messengers, when employed in poindings, are still entitled to their sheriff-fee, which they usually assign to the creditor, on getting a reasonable allowance for their trouble.<sup>(n)</sup>

### III. V.—OF ECCLESIASTICAL PERSONS.

1. The Pope, or Bishop of Rome, was long acknowledged The Pope. over the western part of Christendom for the head of the (1, 5, 6) Christian Church. The papal jurisdiction was first abolished in Scotland *anno* 1560, in a Parliament not regularly authorised by the Sovereign; and afterwards by 1567, c. 2. The King was, by 1669, c. 1, declared to have supreme authority over all persons, and in all causes ecclesiastical; but this Act was repealed by 1690, c. 1, as inconsistent with Presbyterian church government, which was then upon the point of being established.

2. Before the reformation from Popery the clergy was Clergy, secular and regular. divided into secular and regular. The *secular* had a parti-

(3, 4)

(m) When the court, in aid of its own jurisdiction, remits to a sheriff to inquire and report, he is bound to do so, and is not entitled to remuneration; *Dyce*, Oct. 30, 1868, 7 Macph. 31.

(n) The legality of the sheriff-fee is dubious. It is never asked in practice, and it is illegal to ask a fee of any kind from the debtor. But it is competent to poind for the expenses of the poinding; *M'Neill v. M'Murphy*, Feb. 14, 1841, 3 D. 554.

Commenda-  
tors.

cular tract of ground given them in charge, within which they exercised the pastoral office of bishop, presbyter, or other church-officer. The *regular* clergy had no cure of souls, but were tied down to residence in their abbacies, priories, or other monasteries: and they got the name of *regular* from the rules of mortification to which they were bound, according to the institution of their several orders. Upon the vacancy of any benefice, whether secular or regular, Commendators were frequently appointed to levy the fruits, as factors or stewarts during the vacancy. The Pope alone could give the higher benefices *in commendam*; and at last, from the plentitude of his power, he came to name commendators for life, and without any obligation to account. After the Reformation several abbacies and priories were given by James VI. *in perpetuam commendam* to laics.

Church  
government  
since the  
Reformation.

(5)

3. Upon abolishing the Pope's authority the regular clergy was totally suppressed; and in place of all the different degrees which distinguish the secular clergy, we had at first only parochial presbyters or ministers, and superintendents who had the oversight of the church within a certain district. Soon thereafter the church government became Episcopal—by archbishops, bishops, &c., 1606, c. 2; and after some intermediate turns, is now Presbyterian—by kirk-sessions, presbyteries, synods, and general assemblies, 1689, c. 3; 1690, c. 5.

Prelates,  
bishops, and  
chapters.

(4, 7, 8)

Nomination of  
bishops was in  
the Crown.

4. *Prelate*, in our statutes, signifies a bishop, abbot, or other dignified clergyman, who in virtue of his office had a seat in Parliament. Every bishop had his chapter (*capitulum*), which consisted of a certain number of the ministers of the diocese, by whose assistance the bishop managed the affairs of the church within that district. The nomination of bishops to vacant sees has been in the Crown since 1540, c. 125, though under the appearance of continuing the ancient right of election which was in the chapter. The confirmation by the Crown under the Great Seal of the chapter's election, conferred a right to the spirituality of the benefice; and a second grant upon the consecration of the bishop-elect gave a title to the temporality, 1617, c. 1; but this second grant fell soon into disuse.

5. He who founded or endowed a church was entitled Patron. to the right of patronage thereof, or *advocatio ecclesiæ*; (9) whereby, among other privileges, he might present a churchman to the cure in case of a vacancy. The presentee, after he was received into the church, had a right to the benefice *proprio jure*; and, if the church was parochial, he was called a *parson*. The Pope claimed the right of patronage of every kirk to which no third party could show a special title; and, since the Reformation, the Crown, as coming in place of the Pope, is considered as the universal patron where no right of patronage appears in a subject. Where two churches are united which had different patrons, each patron presents by turns, 1617, c. 3, § 3.(o) (10, 11)

6. Gentlemen of estates frequently founded *colleges* or *collegiate churches*, the head of which got the name of *Provost*, under whom were certain prebendaries or canons, who had their several stalls in the church, where they sung masses. Others of lesser fortunes founded *chaplans* within the precincts of a parochial church, or *altarages*, which were donations granted for the singing of masses for deceased friends, at particular altars in a church. Though all these were suppressed upon the Reformation, their founders continued patrons of the endowments; out of which they were allowed to provide bursars, to be educated in any of the universities, 1567, c. 12. As the residence of the bursars, who were truly the superiors of these benefices, and were dispersed over all the universities in Scotland, could hardly be discovered by the heirs who were to enter to the lands as their vassals, the right of entering vassals to these lands was, by 1661, c. 54, given to the patron. (3) (12)

7. Where a fund is gifted for the establishment of a second minister in a parish where the cure is thought too heavy for one, the patronage of such benefice does not belong to the donor, but to him who was patron of the church; *B. of* (15)

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(o) *Grant v. Gordon*, 1788, M. 9945; *Brodie v. E. of Moray*, 1777, M. 9937; *Officers of State v. Gordon*, Nov. 13, 1821, 1 S. 129, 20 F.C. 466; *E. Hopetoun v. E. Rosebery*, March 11, 1835, 13 S. 685. See *infra*, note (a).

The right of  
presentation.

(11)

Right of  
applying the  
vacant sti-  
penda.

(13, 14)

Failure to  
apply.

*Haddington v. E. of Haddington*, Nov. 18, 1680, M. 990; (p) unless either where the donor has reserved to himself the right of patronage in the donation, or where he and his successors have been in the constant use of presenting the second minister without challenge from the patron; *Town of Dundee v. E. of Lauderdale*, Jan. 10, 1683, M. 9904. The right of presenting incumbents was, by 1690, c. 23, taken from patrons, and vested in the heritors and elders of the parish, upon payment to be made by the heritors to the patron of 600 merks; but it was again restored to patrons, 10 An. c. 12, with the exception of the presentations sold in pursuance of the former Act.(q)

8. Patrons were not simply administrators of the church; for they held the fruits of the vacant benefice as their own for some time after the Reformation; 1593, c. 172, &c. But that right is now no more than a trust in the patron, who must apply them to pious uses within the parish, at the sight of the heritors, yearly as they fall due. If he failed, he lost his right of presenting for the next turn, by 1685, c. 18; and after that right was taken away the penalty is, by 1690, c. 23, declared to be the forfeiture of his right of administering the vacant stipend for that and the next vacancy. The King, who is exempted from this rule by said Act 1685, may apply the vacant stipend of his churches to any pious use, though not within the parish.(r) If one should be ordained to a church in opposition to the presentee, the patron, whose civil right cannot be affected by any sentence

(p) See Mackenzie's Works, i. 128; *Cunningham v. Wardrop*, Feb. 26, 1762, M. 9933, 6 Pat. Ap. 733.

Abolition of  
Patronage.

(q) In new parishes created under 7 & 8 Vict. c. 44, the patronage was vested in the male communicants. By 37 & 38 Vict. c. 82 (1874) the Act 10 An. c. 12 is repealed, and also 6 & 7 Vict. c. 61 (the Aberdeen Act) and the right of electing ministers is in all parishes vested in the congregation (communicants and adherents), subject to regulations to be passed by the General Assembly. The church courts have right to decide finally and conclusively upon the appointment, admission, and settlement of ministers. A year's stipend is payable to patrons as compensation on the occurrence of the first vacancy.

(r) By 54 Geo. III. c. 169, vacant stipends and permanent endowments (not including the ann, as to which see *infra*, § 21), though not payable out of teinds (*Mags. of Stirling v. Gordon*, Feb. 24, 1837, 15 S. 657; *Mags. of Dundee v. Nicol*, Nov. 18, 1829, 8 S. 66) are appropriated

of a church court, may retain the stipend as vacant; *Cochrane v. Stoddart*, 1751, M. 9951. Patrons are to this day entitled to a seat and burial-place in the churches(s) of which they are patrons; and the right of all the teinds of the parish not heritably disposed is given to them by 1690, c. 23; 1693, c. 25. Other rights of patrons.

9. That kirks may not continue too long vacant, the patron must present to the presbytery (formerly to the bishop) a fit person for supplying the cure within six months from his knowledge of the vacancy,(t) otherwise the right of presentation accrues to the presbytery, *jure devoluto*, 1567, c. 7; 10 An. c. 12.(u) Upon presentation by the patron, the bishop collated or conferred the benefice upon the presentee, by a writing, in which he appointed certain ministers of the diocese to induct or institute him into the church; which in- Patrons must present within six months. (17-20)  
Form of admission into kirks during Episcopacy.

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to the Ministers' Widows' Fund. See *Cheyne v. Cook*, June 20, 1863, 1 Macph. 963; *E. Kinnoull v. Gordon*, April 17, 1845, 4 Bell's Ap. 126; *Livingston v. Grant*, Dec. 20, 1850, 13 D. 394, aff. 32 Jur. 514.

(i) Patrons are entitled to "the first choice of a seat in the church;" *L. Torphichen v. Gillon*, 1765, M. 9936; and also to a burial-place in the churchyard. But they cannot, unless their claim should be fortified by immemorial usage, demand a burial-place in the church. See Act of General Assembly, Aug. 9, 1643, against burial in churches.—MORE. See Connell's Par. Law, 546; Ivory's Ersk. i. 5, 13; Bell's Prin. 836. The case cited does not necessarily determine this, the patron there being also titular and an heritor. There is no formal decision as to burial within the church (see *Monteith v. Hope*, 4 B. S. 261) or churchyard.

(j) Within six months from the date of the vacancy, not from the patron's knowledge of the vacancy; and it will be sufficient if the presentation is actually executed within the six months, though, from accidents not imputable to the patron, it may not reach the presbytery till after the expiration of this period: *Lord Dundas v. Presby. of Zetland*, 1795, M. 9972.

(u) By 37 & 38 Vict. c. 82, § 7, it is enacted that if on occasion of a vacancy no appointment of a minister be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong to the presbytery *tanquam jure devoluto*, and it has been indicated that this occurs even though an appointment has been made by the congregation, but has proved abortive from no cause imputable to the congregation: *Cassie v. General Assembly of Church of Scotland*, Nov. 25, 1878, 6 R. 221.

Present form  
of admission.

duction completed his right, and was performed by their placing him in the pulpit, and delivering him the Bible and the keys of the church. The bishop collated to the churches of which himself was patron *pleno jure*, or without presentation; which he also did in mensal churches whose patronages were sunk, by the churches being appropriated to him as a part of his patrimony. Since the Revolution, a judicial act of admission by the presbytery, proceeding either upon a presentation or upon a call from the heritors and elders, or upon their own *jus devolutum*, completes the minister's right to the benefice.

Provision for  
the reformed  
clergy.

(ii. 10. 17 *et*  
*seq.*)

10. Soon after the Reformation, the Popish churchmen were prevailed upon to resign in the Sovereign's hands a third of their benefices, which, by 1567, c. 10, was appropriated, in the first place, for the subsistence of the reformed clergy. To make this fund effectual, particular localities were assigned in every benefice, to the extent of a third, called the *assumption of thirds*; and for the farther support of ministers, Queen Mary made a grant in their favour of all the small benefices, not exceeding 300 merks; which was confirmed by 1572, c. 52. Bishops, by the Act which restored them to the whole of their benefices, 1606, c. 2, were obliged to maintain the ministers within their dioceses out of the thirds; and, in like manner, the laic titulars who got grants of the teinds became bound, by their acceptance thereof, to provide the kirks within their erections in competent stipends.

Commission  
for planting  
kirks and  
valuing  
teinds,

(ii. 10. 21)

11. But all these expedients for the maintenance of the clergy having proved ineffectual, a Commission of Parliament was appointed in the reign of James VI. for planting kirks, and modifying stipends to ministers out of the teinds (1617, c. 3), to which a power was soon superadded of dividing large parishes, and erecting new churches, (v) by 1621, c. 5; a second Commission was appointed by 1633, c. 19, not only for modifying stipends, but for the valuation and sale of teinds. After the Restoration, several new Commissions were granted

and for unit-  
ing and dis-  
joining  
parishes,

(v) Various Acts have been passed facilitating the erection of new parishes and disjoining parts of united parishes, as 7 & 8 Vict. c. 44; 39 Vict. c. 11.

by Parliament, with more ample powers of dismembering and annexing churches as they should find just, 1661, c. 61, &c.; but the powers of all these were, by 1707, c. 9, transferred to the Court of Session, with this limitation, that no parish should be disjoined, nor new church erected, nor old one removed to a new place, without the consent of three-fourths of the heritors, computing the votes not by their numbers but by the valuation of their rents within the parish.<sup>(w)</sup> The Judges of Session, when sitting in that court, are considered as a Commission of Parliament, and have their proper clerks, macers, and other officers of court, as such.<sup>(x)</sup>

now transferred to the Session.

12. The lowest stipend that could be modified to a minister by the first Commission, 1617, c. 3, was 500 merks, or five chalders of victual, unless where the whole teinds of the parish did not extend so far: and the highest was 1000 merks, or ten chalders. The Parliament, 1633, c. 8, raised the *minimum* to eight chalders of victual, and proportionally in silver; but as neither the Commission appointed by that Act, nor any of the subsequent ones, was limited as to the maximum, the Commissioners have been in use to augment stipends considerably above the old maximum where there is sufficiency of free teinds and the cure is burdensome, or living expensive.<sup>(y)</sup>

a Maximum and minimum of stipends.

(ii. 10. 46)

13. Where a certain quantity of stipend is modified to a minister out of the teinds of a parish, without proportioning that stipend among the several heritors, the decree is called a decree of modification: but where the Commissioners also fix the particular proportions payable by each heritor, it is

Decree of modification and locality.

(ii. 10. 47)

(w) Now a majority in value; 7 & 8 Vict. c. 44.

(x) Their proceedings are subject to review by the House of Lords; *Milligan v. Wedderburn*, 1784, 2 Pat. App. 621. The powers and duties of the Court of Session, as a Commission of teinds, are now defined and regulated by 48 Geo. III. c. 138; 6 Geo. IV. c. 120, § 54; 28 Vict. c. 36; 31 & 32 Vict. c. 100, § 9, &c.

(y) The Court of Teinds cannot grant a new augmentation until twenty years after the date of the previous one; 48 Geo. III. c. 138. The minimum stipend was, under 50 Geo. III. c. 84, fixed at £150, and where the teinds of the parish are insufficient, that sum is made up by a payment from Exchequer. In new parishes erected under 7 & 8 Vict. c. 44, it is £120, without manse or glebe.

How a modified stipend is secured.

a decree of modification and locality. Where a stipend is only modified, it is secured on the whole teinds of the parish, so that the minister can insist against any one heritor to the full extent of his teinds; (z) such heritor being always entitled to relief against the rest for what he shall have paid above his just share; *Hutchison v. E. Cassillis*, Dec. 3, 1624, M. 14,788: but where the stipend is also localised, each heritor is liable in no more than his own proportion.

Minister's manse;

(ii. 10. 56, 57)

its expense;

who burdened with it.

14. Few of the reformed ministers were at first provided with dwelling-houses; most of the Popish clergy having upon the first appearance of the Reformation, let their manses in feu, or in long tacks: ministers therefore got a right, by 1563, c. 72, to as much of these manses as would serve them, notwithstanding such feus or tacks. When there was no parson's nor vicar's manse, one was to be built by the heritors at the sight of the bishop (now the presbytery), the charge not exceeding £1000 Scots, nor below 500 merks; 1649, c. 45; 1663, c. 21.(a) Under a manse are comprehended a stable, barn, and byre, with a garden; for all which it is usual to allow half an acre of ground. A person whose only interest in the land within the parish is a liferent right is to be burdened with no proportion of the charge in building a manse; *Minister of Moreham v. Binston*, Nov. 14, 1679, M. 8499; but he must bear his share in

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(z) This is still so; Bell's Pr. 1163; but in practice the necessity of such procedure is avoided by interim schemes of locality; A. of S., July 5, 1809; A. of S., June 20, 1838. Heritors over-paying under an interim scheme have relief when the true state of their rights is ascertained by final decree of locality; *Weatherstone v. M. Tweeddale*, Nov. 12, 1833, 12 S. 1. On this subject, see *E. of Cawdor v. Lord Adv.*, March 2, 1878, 5 R. 710; *Campbell's Trustees v. Sinclair*, April 15, 1878, 5 R., H. L. 119.

(a) By usage this limitation is removed, and heritors are obliged to build competent manses; *Dingwall v. Gardiner*, Nov. 27, 1816, 19 F. C. 217; aff. 1 S. Ap. 10. The minister of a parish in a royal burgh not having a landward district attached is not entitled to a manse; *Thomson v. Heritors of Dunfermline*, 1750, M. 8504, Elch. "Manse," 4; *Auld v. Heritors of Ayr*, 2 W. & S. 600. See § 16, note (c) p. 54. Where a minister entitled to a manse cannot get one, he is allowed compensation by 5 Geo. VI. c. 72, § 2.

repairing it, because that has less of the nature of a perpetuity.(b)

15. Every incumbent is entitled at his entry to have his *Free manse*.  
 manse put into good condition ; for which purpose the pres- (ii. 10. 58)  
 bytery may appoint a visitation by tradesmen, and order estimates to be laid before them of the sums necessary for the repairing, which they may proportion among the heritors, according to their valuations ; and letters of horning will, on bill to the Lords, be granted for carrying the presbytery's sentence into execution. The presbytery, after the manse is made sufficient, ought, upon application of the heritors, to declare it a free manse, which lays the incumbent under an obligation to uphold it in good condition during his incumbency ; otherwise he or his executors shall be liable in damages ; see 1612, c. 8. But they are not bound to make up the loss arising from the necessary decay of the building by the waste of time.(c)

16. All ministers, where there is any *landward* or *country* Glebe,  
*parish*, are, over and above their stipend, entitled to a glebe, (ii. 10. 59)  
 which comprehends four acres of arable land, or sixteen sowms of pasture ground where there is no arable land (a sown is what will graze ten sheep or one cow), and is to be designed or marked by the bishop or presbytery out of such to be designed  
 kirk-lands within the parish as lie nearest to the kirk ; 1593, out of kirk  
 c. 165 ; 1606, c. 7.(d) As the benefit intended by these acts lands.

(b) Liferenters seem not liable even for repairs ; *Anstruther v. Anstruther's Tutors*, May 14, 1823, 2 S. 306. Superiors are not heritors in regard to this burden ; *Dundas v. Nicolson*, 1778, M. 8511, Hailes 802.

(c) Wherever, from original insufficiency or lapse of time, the manse requires *extensive* repairs to render it habitable, the heritors are bound to erect a new building. Whether, if the manse is habitable, the presbytery is entitled to order *additions*, or anything more than *repairs*, is a question of circumstances ; *Heritors of Inch v. Storie*, Dec. 10, 1869, 8 M. 363 ; *Heritors of Kingoldrum v. Haldane*, Jan. 24, 1863, 1 M. 325. Under 31 & 32 Vict. c. 96, § 12, mansees are now declared free by the sheriff, but the decree has effect only for fifteen years, or until the appointment of a new minister to the parish ; *Heritors of Pitligo v. Gregor*, June 18, 1879, 6 R. 1062.

(d) Rather in practice "from such as are in situation most commodious for the clergyman ;" *Anderson v. Thomas*, May 22, 1810, 15 F.C.

to the clergy must have been lost where there were no kirk-lands in the parish, it was provided, by 1644, c. 31, that, in default of kirk-lands, the glebe should be designed out of temporal lands; and this Act, though falling under the act rescissory of Charles II., seems to have been considered as still in force by 1663, c. 21, which takes it for granted that all ministers, except those in certain royal boroughs, have right to glebes; see Stair, ii. 3, § 40.(e)

Relief arising  
from the  
designation of  
a manse or  
glebe,

(ii. 10. 60, 61)

is only  
personal.

Glebes and  
manses  
inalienable.

17. A right of relief is competent to the heritors, whose lands are set off for the manse or glebe, against the other heritors of the parish; 1594, c. 202. The statute limits this right to heritors of kirk-lands, and to the special case where the greatest part of the lands in a parish are kirk-lands. The foressaid Act, 1644, which allowed designations out of temporal lands, extended the relief to the heritors of these lands; and if the first part of that Act, allowing such designations, has been received as our law since the Restoration, it may be justly thought that the equitable quality annexed to it ought not to be rejected.(f) This relief, though constituted by statute, is not real against the lands themselves; it is only personal against those who were proprietors at the time of the designation, or their heirs; *Snow v. Hamilton*, June 24, 1675, M. 10,167. Manses and glebes, being once regularly designed, cannot be feued or sold by the incumbent, in prejudice of his successors, 1572, c. 48; which is in

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652, 2 Dow 433. See *Belches v. Moore*, Dec. 23, 1825, 4 S. 347, rev. 2 W. and S. 558.

(e) "When there are two ministers of a royal burgh with a landward district attached, even though part of that district have been originally a separate parish, only the *first minister* can claim a manse and glebe. The second minister, even when his stipend is payable out of the teinds, has no such right; *Adamson v. Paxton*, Feb. 14, 1816, F.C. This is the general rule, but there are exceptions; see the Brechin cases, *Carnegy v. Speid*, July 5, 1849, 11 D. 125; *L. Panmure v. Presby. of Brechin*, Dec. 12, 1855, 18 D. 196; *L. Panmure v. Halket*, July 3, 1860, 22 D. 1357."—MOIR.

(f) As Professor Bell, Pr. 1176, has misunderstood the passage in the Inst., l. c., it is proper to add, that when a glebe is designed out of kirk-lands, no claim of relief lies against the heritors of temporal lands in the parish; *Mags. of Montrose v. Scott*, Jan. 20, 1832, 10 S. 211.

practice extended even to the case where such alienation evidently appears profitable to the benefice.(g)

18. Ministers, besides their glebe, were entitled to grass <sup>Minister's grass.</sup> for a horse and two cows by 1649, c. 45, which is revived by 1663, c. 21; and if the kirk-lands, out of which the grass <sup>(ii. 10. 62, 63)</sup> may be designed, either lie at a distance, or are not fit for pasture, the heritors are to pay to the minister £20 Scots yearly as an equivalent.(h) Ministers have also freedom of foggage, pasturage, fuel, feal, divot, loaning, and free ish and entry, according to use and wont; 1593, c. 165; 1663, c. 21; what these privileges are must be determined by the local custom of the several parishes. Besides the above-mentioned burdens which are imposed upon heritors, the parishioners were obliged to provide communion cups and lavers, 1617, c. 6; and to repair the kirk and kirkyard dykes, 1572, c. 54; 1597, c. 232; but these burdens are now for the most part undertaken by the heritors.(i)

19. It sometimes happens that lands lying at a distance <sup>Annexation quoad sacra.</sup> from the kirk to which they originally belonged are annexed to another nearer kirk *quoad sacra*, or in so far as concerns <sup>(ii. 10. 64)</sup> the pastoral charge. Such lands continue in all civil respects part of the old parish; and consequently are liable in no

(g) The Act 29 & 30 Vict. c. 71, gives ministers power to let their glebes, subject to certain conditions, on leases of eleven years, and, with authority of the Court of Teinds, to feu their glebes or let them on building leases for terms not exceeding ninety-nine years.

(h) The fact that grass-lands have been made arable does not free them from designation as a grass-glebe, though there are other kirk-lands in the pariah in pasture, but less convenient; *Wilkie v. Simpson*, Jan. 25, 1769, 2 Pat. App. 222. On the other hand, the fact that arable church-lands have been laid down in grass does not render them liable to be designed as a grass-glebe; *Macmillan*, Nov. 19, 1867, 6 Macph. 36.

(i) Heritors in this matter are all the owners of lands and houses, including feuars and railway-companies; *Harlow v. Heritors of Peterhead*, 1802, 4 Pat. App. 356; *Boswell v. D. of Portland*, Dec. 9, 1834, 13 S. 148; *Macfarlan v. Monklands Ry. Co.*, Jan. 29, 1864, 2 Macph. 519; *S.N.E. Ry. Co. v. Gardiner*, *ib.* 537; but not including titulars of teinds, superiors, liferenters; *Bruce Carstairs v. Greig*, 1773, M. 2333; *Murray v. Scott*, 1794, M. 15,092; *Anstruther v. Anstruther's Tutors*, May 14, 1823, 2 S. 306; owners of coal-mines; *Bell v. E. of Weyms*, 1805, M. App. "Kirk," 4; or long lease-holders; *M'Laren v. Clyde Trs.*, Nov. 17, 1865, 4 Macph. 58.

proportion of the stipend, nor of the expense necessary for upholding the manse, or even the kirk (j) of the parish to which the inhabitants constantly resort for divine service; *Park v. Maxwell*, 1748, M. 8503.

Terms of pay-  
ment of  
stipend.

(ii. 10. 54)

20. The legal terms at which stipends become due to ministers are Whitsunday and Michaelmas. If the incumbent be admitted to his church before Whitsunday, till which term the corns are not presumed to be fully sown, he has right to that whole year's stipend; and if he is received after Whitsunday, and before Michaelmas, he is entitled to the half of that year; because, though the corns were sown before his entry, he was admitted before the term at which they are presumed to be reaped. By the same reason, if he dies or is transported before Whitsunday, he has right to no part of that year; if before Michaelmas, to the half; and if not till after Michaelmas, to the whole. The reason why the legal term in stipends is Michaelmas, and not Martinmas, as in liferents, arises from the different nature of the two rights. All kirk-benefices did originally, and are still accounted in law to consist of teinds, which were drawn by the churchmen at the cutting of the corns, which was seldom so late as Michaelmas; but rents are not due by the tenant to the landlord till Martinmas at soonest; before which term, the corns are perhaps not fully brought into the barn-yard.

Michaelmas  
the legal term  
in stipenda.

Annat or ann.

(ii. 10. 65, 66)

21. After the minister's death, his executors have right to the annat; which, in the sense of the canon law, was a right reserved to the Pope of the first year's fruits of every benefice. Upon a threatened invasion from England, *anno* 1547, the annat was given by our Parliament, notwithstanding this right in the Pope, to the executors of such churchmen as should fall in battle in defence of their country (c. 4); but the word annat or ann, as it is now understood, is the right

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(j) Lands annexed *quoad sacra* are liable in maintaining the kirk, not of the old parish, but of the new, although no change takes place as to other parochial burdens; *Drummond v. Hers. of Monzie*, 1773, M. 7920. Where a parish is erected *quoad omnia* the heritors of the new parish have to maintain the church, and are alone liable in the parochial burdens, except statute-labour commutation and those excepted by the decree of disjunction and erection; 7 & 8 Vict. c. 44; *Reid*, July 10, 1850, 12 D. 1211; *M. of Bute v. Mags. of Rothesay*, June 23, 1864, 2 Macph. 1278.

which law gives to the executors of ministers, of half-a-year's benefice, over and above what was due to the minister himself for his incumbency, 1672, c. 13 : so that, if the incumbent survives Whitsunday, his executors have the half of that year for the deceased incumbency, and the other half as annat ; if he survive Michaelmas, they have that whole year for his incumbency, and the half of the next in name of ann. This right was first introduced into our law upon a letter of James VI., desiring the bishops to make an act for that purpose ; *E. Marischall v. Peterhead*, July 19, 1626, M. Sup. 33.

22. The executors of a minister need make up no title to the ann by confirmation : neither is the right assignable by the minister, or affectable with his debts, 1672, c. 13 ; for it never belonged to him, but is a mere gratuity given by law to those whom it is presumed the deceased could not sufficiently provide : and law has given it, without distinction, to the executors of all ministers, even where the stipend is made up, not of teinds, but of the public revenue of a borough, or of a voluntary contribution ; *Hutchison v. Town of Edinburgh*, June 9, 1747, M. 467. The statute 1672 gives this right of ann expressly to *executors* ; and if it were to be governed by the rules of succession in executry, the widow, in case of no children, would get one-half, the other would go to the next-of-kin ; and where there are children, she would be entitled to a third, and the other two-thirds would fall equally among the children, iii. 9, § 6. But the Court of Session, probably led by the general practice, have in this last case divided the ann into two equal parts, of which one goes to the widow and the other among the children *in capita* ; *Children of Macdermeit v. Montgomery*, July 14, 1747, M. 464.(k)

The nature of the right.

(ii. 10. 67, 63)

How divided.

23. From the great confidence that was in the first ages of Christianity reposed in churchmen, dying persons frequently committed to them the care of their estates, and of their orphan children ; but these were simply rights of trust, not of jurisdiction. The clergy soon had the address to establish

Jurisdiction of bishops.

(25)

(k) This has always been regarded as somewhat questionable, chiefly in consequence of the author's apparent doubt, *Inst.*, l. c., as to the soundness of this case. Most writers, however, are inclined to adopt the rule which was there laid down.

to themselves a proper jurisdiction, not confined to points of ecclesiastical right, but extending to questions that had no concern with the church. They judged, not only in teinds, patronages, testaments, breach of vow, scandal, &c., but in questions of marriage and divorce, because marriage was a sacrament; in tochers, because these were given in consideration of marriage; in all questions where an oath intervened, on pretence that oaths were a part of religious worship (R. M., l. i. c. 2; l. ii. c. 38, § 5; l. iii. c. 7, § 2), and in the deprivation of notaries, and the trial of those that used false instruments; 1503, c. 64. As churchmen came, by the means of this extensive jurisdiction, to be diverted from their proper functions, they committed the exercise of it to their officials or

Commissaries;

commissaries; hence the Commissary Court was called the Bishop's Court, and *Curia Christianitatis*; it is also styled the Consistorial Court, from *consistory*, a name first given to the court of appeals of the Roman Emperors, and afterwards to the courts of judicature held by churchmen.

by whom  
named.

(26, 27)

24. At the Reformation all Episcopal jurisdiction exercised under the authority of the Bishop of Rome was abolished by an Act 1560, ratified by 1567, c. 2. As the course of justice in consistorial causes was thereby stopped, Queen Mary, besides naming a commissary for every diocese, did, by a special grant mentioned in Books S. March 1, 1563-4, establish a new Commissary Court at Edinburgh, consisting of four Judges or Commissaries; which grant is ratified by an unprinted Act, 1592, c. 25.(1)

Commissaries  
of Edinburgh;

This court is vested with a double jurisdiction: one, *diocesan*, which is exercised in the special territory contained in the grant—viz., the counties of Edinburgh, Haddington, Linlithgow, Peebles, and a part of Stirlingshire; and another, *universal*, by which the Judges confirm the testaments of all who die in foreign parts, and may reduce the decrees of all inferior commissaries, provided the reduction be pursued within a year after the decree; see Instr. to Comm. 1666, c. 16, recited in Acts S., Feb. 28, 1666. Bishops, upon their re-establishment in the reign of James VI., were restored to the right of naming their several commissaries, by 1609, c. 6; and as to the commis-

their twofold  
jurisdiction.

(1) Thomson's Acts, iii. 574.

sariot of Edinburgh, two of the four Judges were, by that Act, to be appointed by the Archbishop of St. Andrews, and two by the Archbishop of Glasgow. Since the Revolution, the nomination of all the commissaries in the kingdom has devolved on the Crown, as coming in place of the bishops.<sup>(m)</sup> There was but one Commissary Court in each diocese till the erection of the Commissariot of Edinburgh; and in pursuance of a commission by James VI., 1581, authorising the Session to erect new ones for the benefit of persons who lived most remote from the Court of the diocese, commissariots were established at Stirling, Peebles, Lauder, and other places which had never been Episcopal sees.

25. As the clergy, in times of Popery, assumed a jurisdiction, independent of the civil power, or any secular court, their sentences could be reviewed only by the Pope, or judges delegated by him; so that with regard to the courts of Scotland their jurisdiction was supreme. But by an Act, 1560, ratified by 1581, c. 115, the appeals from our bishop courts, that were then depending before the Roman consistories, were ordained to be decided by the Court of Session. And by a posterior Act, 1609, c. 6, the Session is declared the King's Great Consistory, with power to review all sentences pronounced by the commissaries. Nevertheless, since that court had no inherent jurisdiction in consistorial causes prior to this statute, and since the statute gives them a power of judging only by way of advocacy, they have not to this day any proper consistorial jurisdiction in the first instance; Stair, iv. 1, 36; neither do they pronounce sentence in any consistorial cause brought from the commissaries, but remit it back to them with instructions. By the practice immediately subsequent to the Act before quoted, they did not admit advocations from the inferior commissaries, till the cause was first brought before the commissaries of Edinburgh; but that practice is now in disuse; *White v. Sibbald*, Jan. 28, 1725, M. 7551.

Jurisdiction of  
commissaries  
originally  
supreme.

(28, 29)

Now subject  
to the review  
of the Session.

26. The commissaries retain to this day an exclusive power of judging in declarators of marriage, and of the nullity of marriage; in actions of divorce and of non-adher-

Extent of the  
commissaries'  
jurisdiction.

(29, 31)

<sup>(m)</sup> Stat. 26 Geo. III. c. 47, § 5.

ence; of adultery, bastardy, and confirmation of testaments; because all these matters are still considered to be properly consistorial. Inferior commissaries are not competent to questions of divorce (1609, c. 6), under which are comprehended questions of bastardy and adherence, when they have a connection with the lawfulness of marriage, or with adultery; see Instr. to Comm., 1666, c. 2.(n)

Now limited  
by a late  
regulation.

- (30) 27. The bishops did by these instructions, in 1666, authorise their commissaries to judge in all causes referred to oath, to the extent of £40 Scots, though the matter should not be consistorial; and, by older instructions, 1563-4, preserved by Balfour, 655, the commissaries were empowered to determine the causes of widows, orphans, and other *personæ miserabiles*, not exceeding £20 Scots. This part of their jurisdiction is now fixed, by Act S., July 29, 1752, declaring that the commissaries have no power to pronounce decrees in absence for any sum above £40 Scots, except in causes properly consistorial; but that they may authenticate tutorial and curatorial inventories; and that all bonds, contracts, &c., which contain a clause for registration in the books of any judge competent, and protests on bills, may be registered in their books. Long before this Act of Sederunt, commissaries had been judged not competent to physicians' fees (*Liddel v. Rob.* Nov. 26, 1622, M. 7553), nor of tutory accounts (*Wright v. Veitch*, Dec. 8, 1675, M. 7578), though they claimed the cognisance of them, as the causes of dying persons, and of orphans.(n)

### TIT. VI.—OF MARRIAGE.

Marriage,  
(1)

1. Persons, when considered in a private capacity, are chiefly distinguished by their mutual relations, as husband and wife, tutor and minor, father and child, master and

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(n) The registration of probative writs and protests in commissaries' books was taken away by 49 Geo. III. c. 42. By 4 Geo. IV. c. 97; 1 Will. IV. c. 69; 6 & 7 Will. IV. c. 41; and 39 & 40 Vict. c. 70, § 35 *et seq.*, all Commissary Courts have been abolished, and each sheriff became

servant. The relation of husband and wife is constituted by marriage, which is the conjunction of man and wife (o) vowing to live inseparably till death.

2. Marriage is truly a contract, and so requires the consent of parties. Idiots, therefore, and furious persons, cannot marry. (p) As no person is presumed capable of consent within the years of pupillarity, which by our law lasts till the age of fourteen in males and twelve in females, marriage cannot be contracted by pupils; L. 3, *C. quando tut. vel cur.* (5. 60); but if the married pair shall cohabit after puberty, such acquiescence gives force to the marriage; L. 4, *de rit. nupt.* (23, 2). Marriage is fully perfected by consent; which, without consummation, founds all the conjugal rights and duties. The consent requisite to marriage must be *de præsenti*. A promise of marriage (*stipulatio sponsalitia*) though it was guarded by certain penalties in the Roman law, L. 5, *de spons.* (5, 1), may, by ours, be safely resiled from as long as matters are entire; but if anything be done by one of the parties whereby a prejudice arises from the non-performance, the party resiling is liable in damages to the other; *Grahame v. Burn*, Jan. 2, 1685, M. 8472. (q) The canonists, and after them our courts of justice, explain a *copula* subsequent to a promise of marriage into actual marriage; *Pennycook v. Grinton*, M. 12,677; Elch. "Proof," 10. (r)

is null without consent;

(2)

which must be *de præsenti*.

(3)

(4)

commissary in his own county, with a jurisdiction applicable chiefly to the confirmation of executors, while causes properly consistorial—i.e., relating to marriage, divorce, legitimacy, bastardy, and separation,—have been made competent in the Court of Session only; see also 24 & 25 Vict. c. 86 (Conjugal Rights Act).

(o) "Woman," Inst., l. c.

(p) Nor persons in such a state of drunkenness as to be incapable of giving consent; *Johnston v. Brown*, Nov. 15, 1823, 2 S. 159 (108).

(q) Damages are due for breach of promise of marriage, even though no special damage can be qualified; *Hogg v. Gow*, May 27, 1812, 16 F.C. 654.

(r) But such promise can be proved only by the writ or oath of party; *Monteith v. Robb*, March 5, 1844, 6 D. 934; *Ross v. M'Leod*, June 7, 1861, 23 D. 973. "Although the meaning of the writing or writings proving the promise may be got at by construction, aided by facts and circumstances, as in the case of *Campbell v. Honeyman* (July 9, 1830, 5 W. & S. 92), the meaning so arrived at must not be doubtful;" Lord Deas, in *Longworth v. Yelverton*, Dec. 19, 1862, 1 Macph. 161; rev. 2

Form of  
celebration.

(5)

Presumed  
marriage.

(6)

Consent of  
parents.

3. It is not necessary that marriage should be celebrated by a clergyman.<sup>(s)</sup> The consent of parties may be declared before any magistrate, or simply before witnesses.<sup>(t)</sup> And though no formal consent should appear, marriage is presumed from the cohabitation, or living together at bed and board, of a man and woman who are generally reputed husband and wife, 1503, c. 77.<sup>(u)</sup> One's acknowledgment of his marriage to the midwife whom he called to his wife, and to the minister who baptised his child, was found sufficient presumptive evidence of marriage, without the aid either of cohabitation or of habite and repute; *Arrot v. Young*, Feb. 1739 (see M. 16,743, Elch. "Proof," 4). The father's consent was, by the Roman law, essential to the marriage of children *in familia*: but by our law children may enter into marriage without the knowledge, and even against the remonstrances of a father.

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Macph. 49. It is still a question whether promise and subsequent *copula* constitute very marriage without a judicial sentence. There is high authority in favour of the view that an action of declarator is essential to the constitution of marriage in this case; Lord Moncreiff in *Browne v. Burns*, June 30, 1843, 5 D. 288; Fraser, H. & W., 2nd ed. i. 324.

(s) "Regular marriages, after publication of banns (*infra*, § 5, and note (y)), may now be celebrated by any clergyman, whether of the Established Church or not; 4 & 5 Will. IV. c. 28; and when so celebrated they appear to exclude all inquiry into the intention or belief of the parties. All other modes of marriage are considered irregular. By 19 & 20 Vict. c. 119, it is provided that no irregular marriage celebrated in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage. But this appears inapplicable to the case of promise *cum copula*, or habit and repute."—MOIR.

(t) *Walker v. Macadam*, March 4, 1807, M. App. "Proof," 4; aff. May 21, 1813, 1 Dow 148, 5 Pat. 675; *Dalrymple v. Dalrymple*, 2 Hag. Cona. 129, and Dodson's separate Report; *Leslie v. Leslie*, March 16, 1860, 22 D. 993 ("a decision which, if circumstances so extraordinary could recur again, would well deserve to be reconsidered."—MOIR).

(u) As to the effect of cohabitation which commenced when parties were not free to marry, see *Cunninghame v. Cunningham*, Feb. 21, 1810 (Balbougie case), Hume 376, rev. 2 Dow 482; *Elder v. M'Lean*, Nov. 17, 1829, 8 S. 56; *Campbell v. Campbell* (Breadalbane case), June 26, 1866, 4 Macph. 867, aff. July 16, 1867, 5 Macph. H. L. 115.

4. Marriage is forbidden within certain degrees of blood. The Romans reckoned a degree for every person generated: by which rule a father and a son are in the first; brothers in the second; and first cousins in the fourth degree of consanguinity. The canon law computes by the persons generated upon one side only,<sup>(v)</sup> which, in the direct line of ascendants and descendants, comes to the same account with the Roman computation; but in the transverse or collateral line makes a considerable variation from it. By 1567, c. 15, which adopts the law of Moses (Levit. c. 18) into ours, seconds in blood, and all remoter degrees, may lawfully marry. By seconds in blood are meant first cousins according to the computation of the canon law, which was at that time the common way in Scotland of reckoning degrees. Marriage in the direct line is forbidden *in infinitum*; as it is also in the collateral line, in the special case where one of the parties is *loco parentis* to the other, as granduncle, great-granduncle, &c., with respect to his grandniece, &c. The same degrees that are prohibited in consanguinity are prohibited in affinity; which is the tie arising from marriage betwixt one of the married pair and the blood relations of the other.<sup>(w)</sup> Marriage, also, where either of the parties is naturally unfit for generation, or stands already married to a third person, is *ipso jure* null.<sup>(x)</sup>

Marriage within forbidden degrees null;

(8)

and marriage in the direct line.

(9)

Other grounds of nullity.

(7)

5. To prevent bigamy and incestuous marriages, the church has introduced proclamation of banns; which is the ceremony of publishing the names and designations (additions) of those who intend to intermarry, in the churches

Proclamation of banns.

(10)

(v) *I.e.*, Counting from the common ancestor.

(w) The prohibition extends to brothers and sisters by affinity (wife's sister or husband's brother); *Fenton v. Livingston*, Jan. 24, 1861, 23 D. 366. The question as to the criminal consequences of such a marriage was there held to be doubtful.

(x) "Impotency is a ground either of intrinsic nullity or of putting an end to the marriage,—for reasons which cannot be entirely resolved into the mere incapacity of procreation of offspring, since, in the case of the marriage of aged persons, unquestionably beyond the years at which offspring could be looked to as possible, it has never been doubted that the marriage remains perfectly valid."—MOIR. See *infra*, § 23, another impediment to marriage.

Clandestine  
marriage.

(11)

where the bride and bridegroom reside, after the congregation is assembled for divine service, that all persons who know any objections to the marriage may offer it. Not bishops only, but presbyteries, assumed formerly a power of dispensing with proclamations of banns on extraordinary occasions (Act. Ass. 1638, sess. 23, § 21), which has not been exercised since the Revolution. When the order of the church is observed, the marriage is called *regular*; (y) when otherwise, *clandestine*. Clandestine marriage, though it be valid, has statutory penalties annexed to it, affecting not only the parties, but the celebrator and witnesses, 1661, c. 34; 1695, c. 12; 1698, c. 6: and over and above, the parties were punished with the loss of certain conjugal rights; the husband lost his *jus mariti*, and the wife her *jus relictæ*, by 1672, c. 9. This last Act, which also inflicted penalties against the then non-conforming clergy, was rescinded in the lump with other acts for conformity by 1690, c. 27; in respect of which the penalties of the Act 1672 against clandestine marriages were found to be taken off; *Carruthers v. Johnston*, Dec. 11, 1705, M. 2252.(z)

Communion of  
goods.

(12)

6. By marriage, a society is created between the married pair, which draws after it a mutual communication of their civil interests, in as far as is necessary for maintaining it. As the society lasts only for the joint lives of the *socii*, therefore rights that have the nature of a perpetuity, which our law styles heritable, are not brought under the partnership or communion of goods; as a land estate, or bonds bearing a yearly interest: (a) it is only moveable subjects, or

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(y) A marriage is also regular if performed by a clergyman on production of a certificate, given by the registrar of the parish or district of fifteen days' residence, of publication of a notice of marriage, 41 & 42 Vict. c. 43.

(z) Hume Com. ii. 463; *Ballantyne*, March 14, 1859, 3 Irv. 352, 667, 31 Jur. 387. By 17 & 18 Vict. c. 80, §§ 48, 49, persons convicted before a magistrate of an irregular marriage are required to register such marriage in the parish in which the conviction is obtained. A marriage established by declarator may be registered by either party in the parish of the domicile or usual residence of the parties. The same Act contains regulations for the registration of regular marriages.

(a) 1661, c. 32; 31 & 32 Vict. c. 101, § 117. The effect of a bond

the fruits produced by heritable subjects during the marriage, that become common to man and wife.(b)

7. The husband, as head of the wife, has the sole right *Jus mariti*, of managing the goods in communion, which is called *jus mariti*. (13) This right is so absolute that it bears but little resemblance to a right of administering a common subject; for the husband can, in virtue thereof, sell, or even gift at his pleasure the whole goods falling under communion; and his creditors may affect them for the payment of his proper debts: so that the *jus mariti* carries all the characters of an assignation by the wife to the husband of her moveable estate.(c) It arises *ipso jure* from the marriage; and, there-

is equivalent  
to an assign-  
nation.

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secluding executors before the term of payment of interest is doubtful; *Barclay v. Pearson*, M. 5777; Bell's Pr. 1552.

(b) It is said that the price of lands is excluded from the *communio bonorum*, and that the uplifting of heritable debts due to the wife does not make them fall under it; Bell's Pr. 1552, 1615. This is certainly correct, if money so uplifted is reinvested on heritable security, or even if the individual money can be traced; *Nisbet v. Renzie*, Dec. 18, 1818, Hume 221; *Baird v. Haddow*, Feb. 2, 1842, 4 D. 564; *Gow v. Lang*, 1816, Hume 216; see *per* Lord Deas and Hope, J.-C., in *Heron v. Espie*, 18 D. 920, 927; *per* Lord Deas in *Smith v. Frier*, Feb. 7, 1857, 19 D. 384. The phrase, communion of goods, has been criticised as being neither happy nor accurate; and it may perhaps be said that the theory of it, which was invented to explain the absolute control exercised by a husband over his wife's moveable estate, has lost its only practical use since the wife's legatees and next of kin were deprived by the Moveable Succession Act (18 Vict. c. 23) of their right to a share of the goods in communion on her predecease. Whether that be so or not, the meaning of the term, which has been somewhat loosely employed, is limited by recent decisions to moveable subjects, which, either in themselves or their fruits, have been capable of actual enjoyment as income during the marriage, and of being applied *ad sustinenda onera matrimonii*. Thus, a policy of insurance effected by a husband on the life of his wife was held not to fall within the *communio bonorum*, so as to entitle her representatives to a share at her predecease; *Wight v. Brown*, Jan. 27, 1849, 11 D. 459; while, on the other hand, a policy of insurance on a husband's life does fall within his *executry* (which is not a convertible term with goods in communion), so as to be subject to *jus relictæ*; *Muirhead v. Muirhead's Factor*, Dec. 6, 1867, 6 Macph. 95. See *Smith v. Kerr*, June 5, 1869, 7 Macph. 863; *Pringle's Trs. v. Hamilton*, March 15, 1872, 10 Macph. 621.

(c) "This moveable estate comprehends bonds, bills, lying money, or

How far it  
may be  
renounced.

(14)

fore, needs no other constitution. Our lawyers of the last age were of opinion that this was a right so inseparable from the husband that all reservation by the wife of the right of administration, or renunciation of it by the husband, was ineffectual; for such reservation or renunciation, as a moveable right conceived in favour of the wife, fell under the *jus mariti*: but it is now an agreed point, not only that a stranger may convey an estate to a wife, so as it shall not be subject to the husband's administration, but that a husband may in the marriage-contract renounce his *jus mariti* in all or any part of his wife's moveable estate; *Walker v. Walker's Crs.*, June 23, 1730, M. 5841.

Paraphernalia  
not subject to  
the *jus mariti*.

(15)

8. From this right are excepted paraphernal goods, which, as the word is understood in our law, comprehends the wife's wearing apparel, and the ornaments proper to her person, as necklaces, ear-rings, breast and arm jewels, buckles, &c. These are neither alienable by the husband, nor affectable by his creditors. Things of promiscuous use to husband and wife, as plate, metals, &c., may become paraphernal, by the husband's (d) giving them to the wife at or before marriage; but they are paraphernal only in regard to that husband who gave them as such, and are esteemed common moveables if the wife under whose *paraphernalia* they were be afterwards married to a second husband; unless he shall in the

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money deposited in bank, debts on open account, arrears of rent or feu-duties, with one exception, viz., arrears of interest due under an adjudication (*Ramsay v. Brownlie*, 1738, M. 5588; *Baikie v. Sinclair*, 1786, M. 5545; aff. March 20, 1787, 3 Pat. 64), furniture, even silver plate; in short, every thing which is not peculiarly dedicated to the wife's use as paraphernal."—MORR. It also comprehended legacies vesting in the wife *stante matrimonio*. Formerly, there was no provision in the law of Scotland corresponding to the English doctrine of a wife's "equity to a settlement" out of any succession or other funds falling to her during her marriage. But this defect is remedied by 24 & 25 Vict. c. 86, § 16, under which it is incompetent for a husband, or any one in his right, to claim property to which his wife acquires right by succession, donation, or otherwise than by her own industry, except on condition of making a reasonable provision for her if that be demanded; and by 40 & 41 Vict. c. 29, her earnings are protected, and she can deal with them as if the *jus mariti* and right of administration were specially excluded.

(d) Or friends, *Cameron v. M'Lean*, Feb. 5, 1875, xiii. S. L. R. 278.

same manner appropriate them to her; *Dicks v. Massie*, Dec. 4, 1696, and Jan. 15, 1697, M. 5821.

9. The right of the husband to the wife's moveable estate is burdened with the moveable debts contracted by her before marriage: and as his right is universal, so is his burden; for it reaches to her whole moveable debts, though they should far exceed her moveable estate.<sup>(e)</sup> Yet the husband is not considered as the true debtor in his wife's debts. In all actions for payment she is the proper defender; the husband is only cited for his interest, that is, as curator to her, and administrator of the society goods: as soon, therefore, as the marriage is dissolved, and the society goods thereby suffer a division, the husband is no farther concerned in the share belonging to his deceased wife;<sup>(f)</sup> and, consequently, is no longer liable to pay her debts, which must be recovered from her representatives, or her separate estate.

Burdens affecting the *jus mariti*.

(16)

How restricted in favour of the husband.

10. This obligation upon the husband is perpetuated against him—1. Where his proper estate, real and personal, has been affected, during the marriage, by complete legal diligence; in which case the husband must, by the common rules of law, relieve his property from the burden with which it stands charged: but the utmost diligence against his person is not sufficient to perpetuate the obligation; *Douglas v. Stirling*, Feb. 26, 1623, M. 5861: nor even incomplete diligence against his estate; *Wilky v. Morison and Stuart*, Jan. 23, 1678, M. 5876.<sup>(g)</sup> 2. The husband continues liable even after the wife's death, in so far as he is *lucratus* or profited by her estate. Law does not consider a husband who has got but a moderate tocher by his wife as a gainer by

(17)

How extended against the husband.

(e) By 40 & 41 Vict. c. 39, § 4, in future marriages the husband's liability is limited to the value of any property he shall have received from, through, or in right of his wife.

(f) Since 18 Vict. c. 23, there is no longer a division of the goods in communion when the wife predeceases; but that does not appear to affect the rule of law here stated.

(g) This doctrine has been questioned (More's Stair, i. 4, 17 f.n., and Notes, xxiv.); and it has been said that all decrees and diligence against a husband's estate for his wife's proper debts subsist notwithstanding the dissolution of the marriage. But Bell's Pr. 1671, and Fraser, H. & W., 2nd ed., 592, 593, as well as Elchies' Annot. 21, support the rule laid down above.

the marriage; *Burnet v. Lepers*, Dec. 23, 1665, M. 5863: it is the excess only which is *lucrum*, and which must be judged of according to the quality of the parties and their condition of life. As the husband was at no time the proper debtor in his wife's moveable debts, therefore, though he should be *lucratus*, he is, after the dissolution, only liable for them *subsidiarie*; i.e., if her own separate estate is not sufficient to pay them off; *Earl of Leven v. Montgomery*, Feb. 27, 1683, M. 3217.

Husband's  
liability in  
bonds bearing  
interest, &c.

(18, 19)

11. Where the wife is debtor in that sort of debt which, if it had been due to her, would have excluded the *jus mariti*, e.g., in bonds bearing interest, the husband is liable only for the bygone interest, and those that may grow upon the debt during the marriage; because his obligation for her debts must be commensurated to the interest he has in her estate, *Gordon v. Davidson*, July 13, 1708, M. 5780. It is the husband alone who is liable in personal diligence for his wife's debts while the marriage subsists: the wife, who is the proper debtor, is free from all personal execution upon them while she is *vestita viro*; *Gordon v. Campbell*, Jan. 11, 1704, M. 5787.

The husband  
is his wife's  
curator.

(19, 20)

Effects of this  
curatory;

(21-23)

12. The husband by marriage becomes the perpetual curator of the wife. From this right it arises (1) that no suit can proceed against the wife till the husband be cited for his interest: and if she is married during the dependence of a process against her before an inferior court, and if the husband dwells within another territory, he must be called by letters of supplement, which are granted of course by the Court of Session.<sup>(h)</sup> (2) All deeds done by a wife without the husband's consent are null;<sup>(i)</sup> neither can she sue in any action without the husband's concurrence.<sup>(j)</sup> Where the

(h) Now, the sheriff's own warrant to cite a party not within his jurisdiction is made effective by being endorsed by the sheriff-clerk of the territory in which he is living; 2 Vict. c. 119, § 24.

(i) In reference to her separate estate, her position is just the same as that of an unmarried woman, but personal obligations contracted altogether unconnected with her separate estate will not bind her; *Biggart v. City of Glasgow Bank*, Jan. 15, 1879, 6 R. 470.

(j) But a married woman may sue for damages for slander if living separate from her husband; *Mackenzie v. Ewing*, Nov. 19, 1830, 9 S. 31;

husband refuses, or by reason of forfeiture, &c., cannot concur, or where the action is to be brought against the husband himself for performing his part of the marriage articles, the judge will authorise her to sue in her own name.<sup>(k)</sup> To prevent the necessity of applying for the Court's authority, care is generally taken in marriage-contracts to name certain trustees, at whose instance execution may pass against the husband. The effects arising from this curatorial power discover themselves even before marriage, upon the publication of banns; after which the bride, being no longer *sui juris*, can contract no debt, nor do any deed either to the prejudice of her future husband, nor even to her own; *Lady Bute v. Sheriff of Bute*, 1665, M. 6030: But it is not enough for this purpose that the banns have been published at the bridegroom's parish church; the notification must be also made at the bride's, in order to interpel persons from contracting with her; *Macdougall v. Aitken*, July 8, 1623, M. 6027.

13. If the husband should either withdraw from his wife, or turn her out of doors,<sup>(l)</sup> or if, continuing in family with her, he should by severe treatment endanger her life,<sup>(m)</sup> the commissaries will authorise a separation *a mensa et toro*, and give a separate alimony to the wife suitable to her husband's estate, from the time of such separation until either a reconciliation or a sentence of divorce.<sup>(n)</sup>

Separate  
alimony.

(19)

or after her husband's death; *Smith v. Stoddart*, July 5, 1850, 12 D. 1185. It has not been expressly decided that she can bring such an action during his life without his concurrence. See *infra*, note (n).

(k) A curator *ad litem* is generally appointed; *Smith v. Smith*, Jan. 11, 1866, 4 Macph. 279.

(l) It has been held that the husband may assign his wife a separate residence without justifying a judicial separation; *Colquhoun v. Colquhoun*, 1804, M. App., "Husband and Wife," 5; but this is questioned by Bell, Pr. 1542.

(m) Or her health, though with personal violence, or reasonable apprehension of it; *Shand*, Feb. 28, 1832, 10 S. 384; *Paterson*, Jan. 24, 1849, 11 D. 421, rev. Aug. 9, 1850, 7 Bell 337; *Fulton*, June 28, 1850, 12 D. 1104; or if he commit adultery; *Wilson*, May 23, 1866, 4 Macph. 732; *Stuart*, June 3, 1870, 8 Macph. 821.

(n) A wife deserted by her husband may obtain from the Court of Session or sheriff (37 & 38 Vict.) an order protecting property which

What obligations of the wife valid. Obligations *ex delicto*.

(24)

14. Certain obligations of the wife are valid, notwithstanding her being *sub cura mariti*, e.g., obligations arising from delict; for wives have no privilege to commit crimes. But if the punishment resolves into a pecuniary mulct, the execution of it must, from her incapacity to fulfil, be suspended till the dissolution of the marriage, unless the wife has a separate estate exempted from the *jus mariti*; *Murray v. Graham*, July 2, 1724, M. 6079; *Gordon v. Pain*, Dec. 6, 1738, M. 6079.(o)

Personal obligations null.

(25, 28)

15. Obligations arising from contract affect either the person or the estate. The law has been so careful to protect wives while *sub cura mariti* that all personal obligations granted by a wife, though with the husband's consent, as bonds, bills, &c., are null,(p) with the following exceptions:—

Exceptions.

(1) Where the wife gets a separate *peculium* or stock, either from her father or a stranger, for her own or her children's alimony, she may grant personal obligations in relation to such stock; *Neilson v. Arthur*, 1672, M. 5984;(q) and by stronger reason, personal obligations granted by a wife are

she has acquired or may acquire by her own industry after such desertion, or which she has succeeded to or may succeed to; subject to a power to the husband or his creditors to apply for the recall thereof. After such an order the wife's property belongs to her as if she were unmarried, and it has all the effects of a decree of separation. She may sue and be sued; 24 & 25 Vict. c. 86, §§ 1-5; *Turnbull v. Turnbull*, Jan. 14, 1864, 2 Macph. 402; *Chalmers v. Chalmers*, March 4, 1868, 6 Macph. 547. The effects of a decree of separation on the wife's property are now regulated by 24 & 25 Vict. c. 86, § 6.

(o) It is quite fixed that a husband or his estate is not liable to reparation for his wife's delict, or quasi-delict, e.g., slander; *Chalmers v. Baillie*, M. 6083, 3 Pat. App. 213; *Barr v. Neilsons*, March 20, 1868, 6 Macph. 651.

(p) But apparently only *ope exceptionis*, and such obligations may be homologated by the wife if she survive the dissolution of the marriage; see Inst., iii. 3. 47; *Gordon v. Farquhar*, 1766, 5 B. S. 932; *Thomson v. Stewart*, Feb. 11, 1840, 2 D. 564; Shaw's Bell's Com., 19, n.

(q) This doctrine, which is still more broadly stated in the Inst., l. c., "is now held to be erroneous, and the only exception to the rule which is admitted is where the personal obligation has been granted for something which has been in *rem versum* of the wife; *Harvey v. Chessels*, 1791, Bell's Cases, 255."—MOIR. But see Bell's Pr. 1612, and *supra*, § 12, note (k).

good when her person is actually withdrawn from the husband's power by a judicial separation.<sup>(r)</sup> (2) A wife's personal obligation granted in the form of a deed *inter vivos* is valid if it is not to take effect till her death; *Colquhoun (L. Tillieheun) v. Rosebank*, Feb. 1720, M. 5973.<sup>(s)</sup> (3) Where the wife is by the husband *præposita negotiis*, intrusted with the management either of a particular branch of business or of his whole affairs, all the contracts she enters into in the exercise of her *præpositura* are effectual, even though they be not reduced to writing, but should arise merely *ex re*, from furnishings made to her. But such obligations have no force against the wife; it is the husband only, by whose commission she acts, who is thereby obliged. A *præpositura* may be constituted, not only formally by writing, but tacitly, by the wife's being in use for a tract of time together to act for her husband, while he either approves of it by fulfilling her deeds, or at least, being in the knowledge thereof, connives at it; *Wilson v. Deans*, 1675, M. 6021.<sup>(t)</sup>

Contract of a wife who is *præposita*,

(26)

binds the husband, not her.

16. A wife, while she remains in family with her husband, is considered as *præposita negotiis domesticis*; and, consequently, may provide things proper for the family, for the price whereof the husband is liable, though they should be misapplied, or though the husband should have given her money to provide them elsewhere; *Dalling v. Mackenzie*, 1675, M. 6005. A husband who suspects that his wife may

The wife is *præposita negotiis domesticis*.

Inhibition against a wife.

(<sup>r</sup>) Or when she is living separate, engaged in trade for herself; *Orme v. Diffors*, Nov. 30, 1833, 12 S. 149. In such circumstances she now generally obtains an order of protection, *supra*, § 13, note (<sup>n</sup>).

(<sup>s</sup>) Bankton, i. 5-67, is of an opposite opinion, and Professor Moir observes that this point "can hardly be considered as settled;" referring to *Miller v. Milne's Trs.*, Feb. 3, 1859, 21 D. 377, "in which the question of power of the married woman to grant such a document was not decided, the Court having held that, whether the writing imported a bequest or an obligation, and whatever might be its validity in the latter case, it had fallen from the predecease of the party in whose favour it was conceived."

(<sup>t</sup>) But this distinction is to be observed, "if she is allowed to manage a particular department, such as a shop, tavern, or lodging-house, the *præpositura* will embrace the power of ordering goods, or whatever may be essential to the carrying on of the trade. But to enable her to uplift money, or grant a binding receipt, she must have an authority in writing; Bell's Pr. 1567; Ersk., i. 6, 26."—MOIR.

hurt his fortune by high living may use the remedy of inhibition against her; by which all persons are interpellated from contracting with her or giving her credit. After the completing of this diligence,<sup>(u)</sup> whereby the *præpositura* falls, the wife cannot bind the husband, unless for such reasonable furnishings as he cannot instruct that he provided her with *aliunde*.<sup>(v)</sup> As every man, and consequently every husband, has a right to remove his managers at pleasure, inhibition may pass at the suit of the husband against the wife, though he should not offer to justify that measure by an actual proof of the extravagance or profuseness of her temper; *C. of Caithness v. E. Caithness*, M. 6025.

Rights affecting her moveable estate;

(27, 28)

her heritable estate.

17. As to the rights granted by the wife affecting her estate; she has no moveable estate, except her *paraphernalia*;<sup>(w)</sup> and those she may lien or impignorate, with consent of the husband as curator, otherwise not; *Gemmil v. Yule*, July 11, 1735, M. 5997. She can even, without her husband, bequeath by testament her share of the goods in communion; <sup>(x)</sup> but she cannot dispose of them *inter vivos*, for she herself has no proper right to them while the marriage subsists: see *Matthew v. Sibbald*, Dec. 19, 1626, M. 5959. A wife can lawfully oblige herself, in relation to her heritable estate, with consent of her husband; for though her person is in some sense sunk by the marriage, she continues capable of holding a real estate; and in such obligations her estate is considered, and not her person; *Eleis v. Keith*, Dec. 15, 1665, M. 5987; *Bruce v. Paterson*, January 23, 1678, M. 5965. A husband, though he be curator to his wife, can, by his acceptance or intervention, authorise rights granted by her in his own favour; for a husband's curatory is not intended only for the wife's advantage, but is considered as a mutual benefit to both.

(u) See Book ii. title 11, § 2.

(v) Inhibition against a Scotswoman was held effectual even against tradesmen in London; *Topham v. Marshall*, 1808, M. App. "Inhibition," 2. A private notice to an individual tradesman is equally effectual so far as he is concerned; *Buie v. Gordon*, Feb. 23, 1827, 5 S. 464, and July 9, 1831, 9 S. 923.

(w) See *supra*, §§ 7 and 12.

(x) This is not now law; 18 Vict. c. 23, and *supra*, § 7, note (c).

18. All donations, whether by the wife to the husband, or by the husband to the wife, are, both by the Roman law and ours, revocable by the donor; *ne conjuges mutuo amore se spolient*, l. 1, *de don. int. vir. et ux.* (24,1); but if the donor dies without revocation, the right becomes absolute. A right may be revoked, not only by an explicit revocation, but tacitly, by afterwards conveying to another the subject of the donation, or by charging it with a burden in favour of a third party; but in so far as the subject is not burdened the donation subsists; *Kinloch v. Rait*, 1674, M. 11,345.(y) Though the deed should be granted nominally or in trust to a third party, it is subject to revocation if its genuine effect be to convey a gratuitous right from one of the spouses to the other; *plus enim valet quod agitur, quam quod simulate concipitur*; *Sanders v. Dunlop*, Feb. 1, 1728, M. 6108.(z) Where the donation is not pure, it is not subject to revocation: thus, a grant made by the husband in consequence of the natural obligation that lies upon him to provide for his wife, is not revocable unless in so far as it exceeds the measure of a rational settlement. Neither are remuneratory grants revocable, where mutual grants are made in consideration of each other, *Chisholm v. Lady Brae*, Jan. 26, 1669, M. 6137; except where an onerous cause is simulated, and a

Donations betwixt husband and wife are revocable.

(29, 31)

Rational or remuneratory grants are not revocable.

(30)

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(y) Contracting of debt does not operate as a revocation, but creditors may exercise the husband's power to revoke, *Inst.*, l. c.; *Bell's Pr.* 1618. Where there is no antenuptial contract, a postnuptial deed, making a reasonable provision for a wife, to take effect after the dissolution of the marriage, is not revoked by the husband's sequestration; *Craig v. Gallowsy*, June 22, 1860, 22 D. 1211, rev. July 17, 1861, 4 Macq. 267. But a postnuptial provision for the wife's aliment during marriage is revoked by his sequestration, because then the husband is bound to support her; *Dunlop v. Johnston*, March 24, 1865, 3 Macph. 758, aff. April 2, 1867, 5 Macph. H. L. 22, 1 L. R. S. Ap. 109; *Miller v. Learmonth*, Nov. 21, 1871, 10 Macph. 107.

(z) The question is, whether such deeds in substance and reality import gifts to the spouse? "It is not enough to deprive a deed of that character that the name of another party is mixed up with it, or even that under the deed another party may have interests separate and absolute conveyed to him;" *Fernie v. Colquhoun*, Dec. 20, 1854, 17 D. 223; *Jardine v. Currie*, June 17, 1830, 8 S. 937.

donation truly intended; or where what is given *hinc inde* by the husband and wife bears no proportion to each other. All voluntary contracts of separation, by which the wife is provided in a yearly alimony, were by our more ancient practice reprobated as contrary to one of the essential duties of marriage, adherence; *Drummond v. Rollock*, Feb. 11, 1634, M. 6152; but by our later decisions they are effectual as to the time past, but revocable either by the husband or wife; *Livingston v. Begg*, Feb. 6, 1666, M. 6153.(a)

Ratification by  
wives.

(33-36)

The proper  
subject  
thereof.

19. As wives are in the strongest degree subject to the influence of their husbands, third parties in whose favour they had made grants were frequently vexed with actions of reduction, as if the grant had been extorted from the wife through the force or fear of the husband. To secure the grantees against this danger ratifications were introduced, whereby the wife, appearing before a judge, declares upon oath (her husband not present) that she was not induced to grant the deed *ex vi aut metu*. Every deed by which any interest accrues to a third party may be secured by ratification, though a consequential benefit should arise from it to the husband, 1481, c. 84; but pure donations betwixt man and wife do not appear to be the proper subjects of ratification; for law has made these revocable, as proceeding from the love, not the fear, of the husband: and if a donation by a wife were rendered irrevocable by her ratification, which a husband might easily obtain by the same methods of persuasion which procured the gift, the law of donations betwixt man and wife would turn out a most unequal one to the wife. A wife's ratification is not absolutely necessary for securing the grantee: law, indeed, allows the wife to bring reduction of any deed she has not ratified, upon the head of force or fear, of which, if she bring sufficient evidence, the deed will be set aside; but if she fails in the proof, it will

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(a) Unless proceeding on a narrative of grounds sufficient to sustain a judicial separation, when proof will be allowed in support of such a plea; *Shand v. Shand*, Feb. 28, 1832, 10 S. 384. See *Warrender v. Warrender*, Aug. 27, 1835, 2 S. & M'L. 154.

remain effectual to the receiver; *Hay v. Cumming*, June 28, 1706, M. 16,506.(b)

20. Marriage, like other contracts, might by the Roman law be dissolved by the contrary consent of parties; which unlimited power of divorce, after it had been for some time restrained, was again revived by the Christian Emperor Justinian; Nov. 140, c. 1: but by the law of Scotland, agreeably to the rules of our holy religion, marriage cannot be dissolved till death, except by divorce proceeding either upon the head of adultery (Matt. xix. 8, 9; Mark x. 11), or of wilful desertion (1 Cor. vii. 15). Dissolution of marriage, (37)

21. Marriage is dissolved by death, either within year and day of its being contracted, or after year and day. If it is dissolved within year and day, (c) all rights granted in consideration of the marriage become void, and things return to the same condition in which they stood before the marriage; the tocher returns to the wife, or those from whom it came; and all the interest, either legal or conventional, arising to the wife in the husband's estate, returns to the husband or his heirs. In consequence of this rule the right that the husband acquires by marriage to the wife's moveable estate determines by the dissolution within year and day; with this restriction, that he is considered as a *bona fide* possessor, in relation to what he has consumed of these moveables, upon the faith of his right, while it subsisted; but he is liable to repay the tocher, without any deduction in consideration of his family expense during the marriage; *Gordon v. Inglis*, Feb. 23, 1681, M. 6180. by death within year and day; (38, 39)

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(b) "If force or fear can be proved in the ratification as well as in the deed ratified, it will be of no avail to protect the grantee against reduction."—MORE. See Inst., i. 6, 34; Bell's Conveyancing, i. 126. There is, however, no express decision to this effect, except *A. v. B.*, 1612, M. 16,481, against which there is the authority of *Grant v. Leslie*, 1642, M. 16,483, and Bell's Com. i. 142-3. "Such a ratification would not exclude a challenge upon any other ground apart from force or fear, such as fraud."—MORE.

(c) Since 1854 (18 Vict. c. 23), the distinction as to the patrimonial effects of marriage treated of in this section no longer obtains, and the rights which emerge are the same as when, under the former law, the dissolution took place after year and day.

sides, equity hinders the restoring of one party and not the other; *Petry v. Paul*, July 20, 1664, M. 9136.

after year and  
day.

(41)

Wife's mourn-  
ings and ali-  
mony to the  
term.

Dissolution  
after a living  
child.

(40, 42)

22. Upon the dissolution of a marriage after year and day, the surviving husband becomes the irrevocable proprietor of the tocher; and the wife, where she survives, is entitled to her jointure, or to her legal provisions of terce (ii. 9, § 26), and *jus relictæ* (iii. 9, § 5). She has also right to mournings suitable to the husband's quality, and to alimony from the day of his death till the term at which her liferent provision, either legal or conventional, commences: the measure of which alimony is regulated not by the extent of her jointure, but by the husband's quality and fortune, and the condition of the family left by him; *Cred. of Scot v. Ker*, July 15, 1713, M. 5916.(d) If a living child be procreated of the marriage, who has been heard to cry, the marriage has the same effect as if it had subsisted beyond the year. The crying of the child is, according to *Stair*, i. 4, § 19, the only evidence that ought to be received of its being born alive, that the matter may not be left to the uncertain conjectures of those who attend the birth of children; but the doctrine of the Roman law appears more equitable, which admits other circumstances, where they are equally strong, in proof of that fact; l. 3, *C. de post. her.* (6, 29).(e) A day is adjoined to the year *in majorem evidentiam*, that it may clearly appear that the year itself is elapsed; and therefore the running of any part of the day after the year has the same effect as if the whole were elapsed. The disputes that might arise from the dissolution of a marriage within the year are generally prevented by a

(d) *Sheddan v. Gibson*, 1802, M. 11,855. The leading principle is that the amount shall bear a proportion to the husband's quality and position, and the nature of the establishment which naturally falls to be kept up in the interval between his death and the next term; *Baroness de Blonay v. Oswald's Reprs.*, July 17, 1863, 1 Macph. 1047; *Palmer v. Sinclair*, June 27, 1811, F.C.; *M. Breadalbane*, March 11, 1843, 15 Jur. 389; *Macintyre*, July 9, 1865, 3 Macph. 1074.

(e) Lord *Stair's* test of viability appears to be received for all cases in which that question arises; *Dobie v. Richardson*, 1765, M. 6183; *Robertson v. Moderator of Gen. Assembly*, Jan. 22, 1833, 11 S. 297. But this condition has also ceased to exist, except as to the courtesy; 18 Vict. c. 23.

clause in marriage contracts, that the interest of the husband and wife shall continue though the marriage should be dissolved sooner without a living child. The legal right of courtesy competent to the surviving husband is to be explained; ii. 9, § 30.

23. Divorce is such a separation of married persons, during their lives, as looses them from the nuptial tie, and leaves them at freedom to intermarry with others. Marriage, being by the canonists numbered among the sacraments, is reckoned a bond so sacred that nothing can dissolve it. In the case of adultery itself, they allow only a separation from bed and board; and even by our law neither adultery nor wilful desertion are grounds which must necessarily dissolve marriage; they are only handles which the party injured may take hold of to be free. Cohabitation, therefore, by the injured party, after being in the knowledge of the acts of adultery, implies a passing from the injury; (f) and no divorce can proceed which is carried on by collusion betwixt the parties, lest, contrary to the first institution of marriage, they might disengage themselves by their own consent; *Watson v. Cruickshank*, July 15, 1681, M. 330. (g) As by divorce the nuptial tie itself is loosed, the guilty person, as well as the innocent may contract second marriages; but in the case of divorce upon adultery, marriage is, by special statute, prohibited betwixt the two adulterers; 1600, c. 20, a doctrine borrowed from L. 13, *de his quæ ut ind.*, 34, 9. (h)

Dissolution by divorce upon adultery.

(43, 45)

Cohabitation after adultery excludes divorce.

(f) In one case long delay was held to bar an action for divorce, *A. B. v. C. D.*, July 20, 1853, 15 D. 976. As to the nature of the facts inferring condonation or *remissio injuriæ*, see *Fairlie v. Fairlie*, 6 Pat. App. 121; *Wemyss v. Wemyss*, March 20, 1866, 4 Macph. 660.

(g) "It was at one time held, following the Roman and the canon laws, that recrimination or mutual guilt was a bar to divorce on the ground of adultery. But a different view has been taken in later times; and the effect of mutual guilt is not to bar the right to divorce, but to give a right to mutual divorces, the consequences of which would seem to be that neither of the spouses can claim any right or interest in the estate of the other."—MOIR. See *Donald v. Donald*, March 30, 1863, 1 Macph. 741. Lenocinium or connivance is also a bar to divorce; *Donald, supra*; *Wemyss v. Wemyss, supra*.

(h) This prohibition applies, by the express terms of the statute, only to the marriage of adulterers with those "with whom they are declared

Divorce upon  
wilful deser-  
tion;

(44)

24. Where either party has deserted from the other for four years together, that other may, by 1573, c. 55, sue for adherence before the commissary,<sup>(i)</sup> whose decree the Session may enforce by letters of horning; if these have no effect, the church is to proceed, first by admonition, then by excommunication; all which previous steps are declared to be a sufficient ground for pursuing a divorce. *De praxi*, the commissaries pronounce sentence in the adherence after one year's desertion; but four years must intervene between the first desertion and the decree of divorce. By the instructions, 1666, c. 2, the inferior commissaries can only judge in the previous action of adherence; the divorce must be carried before the Commissaries of Edinburgh.<sup>(j)</sup>

its effects.

(46, 48)

25. The legal effects of divorce on the head of desertion are particularly defined by 1573, c. 55, by which the party offending forfeits the tocher and the *donationes propter nuptias* (as to which see Nov. 117, c. 8, § 2). By these, when applied to our law, must be understood the provisions that the wife is entitled to, either by law or by paction, in consideration of the tocher; and the meaning of the act is, that the offending husband shall restore the tocher and forfeit

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by a sentence of the ordinary judge to have committed the adultery;” so that a marriage between adulterers is valid where there has not been a divorce by a judicial sentence,—or even, it has been said, where the marriage is not with a paramour named in a decree of divorce; *Campbell v. Campbell*, June 26, 1866, 4 Macph. 867, aff. July 16, 1867, 5 Macph. H. of L. 115; *Beattie v. Beattie*, Dec. 15, 1866, 5 Macph. 181.

(i) See *supra*, § 13, note (n), as to lesser remedy of order of protection.

(j) This jurisdiction of the commissaries is now vested in the Court of Session; see 1 Will. IV. c. 69, § 33; 24 & 25 Vict. c. 86. Under the provisions of the latter statute, it is “no longer necessary, prior to suing for divorce on the ground of desertion, to institute an action of adherence nor to apply to the presbytery as the old form. By the lapse of four years, the party acquires a vested right to a divorce, and may proceed at once with an action for dissolution of the marriage; *M<sup>c</sup>Callum v. M<sup>c</sup>Callum*, Feb. 13, 1865, 3 Macph. 550.”—MOIR. A wife seeking this remedy must be willing to “adhere;” for ill-treatment by her husband such as to compel her to live apart from him will not be held a constructive desertion. For that the proper remedy is an action of aliment and separation *a mensa et toro*; *Bowman v. Bowman*, Feb. 7, 1866, 4 Macph. 384.

to the wife all her provisions, legal and conventional ; and, on the other hand, the offending wife shall forfeit to the husband her tocher, and all the rights that would have belonged to her in the case of her survivance. This Lord Stair (i. 4, § 20) judges to be also the rule in divorce upon adultery ; as it was by the Roman law, d. Nov. 117.(k) But by a decision (*Justice v. Murray*, 1762, M. 334) founded on a tract of ancient decisions recovered from the records, the offending husband was allowed to retain the tocher.(l)

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#### NOTE ON INTERNATIONAL LAW AS TO MARRIAGE, LEGITIMATION, AND DIVORCE.

The leading points of international law relative to marriage which have been determined may here be adverted to:—"A marriage, wherever it has been validly celebrated, is a marriage all the world over ; but it must be celebrated according to the law of the country where it takes place. A marriage, for instance, between two Scotch persons in England, by simple acknowledgment of each other before witnesses as husband and wife, would of itself be of no avail. But if the marriage is once validly contracted *secundum legem loci*, the incidents and consequences of that marriage, both as regards the parties and the offspring, depend on the domicile of the husband, since the wife's domicile, in the general case, follows his. Scotch parties domiciled in Scotland go into England and celebrate a mar-

Marriage valid  
*secundum*  
*legem loci*  
*celebrationis*.

Consequences  
of marriage  
follow hus-  
band's domi-  
cile.

(k) "Death before decree of divorce bars these consequences, for they follow, not upon the adultery, however clearly proved, but upon the decree of divorce itself ; *Clement v. Sinclair*, March 4, 1762, M. 337. The rights of the parties are fixed as at the date of the decree, and the innocent party can claim no right or interest in any estate afterwards acquired ; *E. of Elgin v. Fergusson*, Jan. 26, 1827, 5 S. 243."—MOIR.

(l) This case has been questioned ; see Inst., i. 6, 48, and Ivory's Notes ; *Johnstone Beattie v. Dalzell*, Feb. 7, 1868, 6 Macph. 333, where it was held that the rule applies to a sum settled by the wife's father on the husband, and that the forfeiture affects the guilty husband's assignees ; see *Johnstone Beattie v. Johnstone*, Feb. 5, 1867, 5 Macph. 340. "If the wife claims the benefit of provisions, she cannot claim also the tocher, which is the consideration for these."—*Per LORD WESTBURY* in *Harvey v. Farquhar*, Feb. 22, 1872, H. L. 10 Macph. 26.

riage there according to the law of England; the marriage is a Scotch marriage, and the consequences which flow from it are regulated by Scotch law, whether as regards the children born before or after the marriage. Again, English parties having no Scotch domicile come into Scotland and are married here, but the marriage remains to all intents an English marriage. Thus, where the marriage is an English marriage, i.e., contracted with reference to a permanent English domicile, all the rights which the English law confers on the wife belong to her, and may be enforced by her in a Scotch court. A remarkable instance of this adherence of English rights to a Scotch party, and of her right to demand in a Scotch court the same remedies which would have been competent to her in England, is afforded by the case of the *Duchess of Buckingham v. Winterbotham*, June 13, 1851, 13 D. 1129. So, in questions of legitimation *per subsequens matrimonium*, it is now settled, to use the words of Lord Brougham, 'that the child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland by the subsequent marriage of the parents in England, if the domicile of the father was and continued throughout to be in Scotland;' *Macdougall v. C. Dalhousie*, and *Munro v. Munro*, Nov. 15, 1837, 16 S. 6, rev. Aug. 10, 1840, 1 Rob. 475, 492, 605; *Ross v. Munro*, May 15, 1827, 5 S. 605, rev. July 14, 1830, 4 W. & S. 289. Although, in regard to personal status and right to heritable succession in Scotland, these judgments are conclusive in favour of the legitimation of the child, it is held in England that the rule of inheritance, according to which the land shall not go to the eldest lawful son, but to the eldest son born in lawful wedlock actually and in fact, and not according to the fiction of Scotch law, is a rule incorporated with the land, with which the law will not suffer any foreign law to interfere; consequently, it was found that a person legitimated *per subsequens matrimonium* could not inherit real estate in England; *Birtwhistle v. Vardill*, 5 B. & C. 430, aff. 7 C. & F. 935, 9 Bligh 48, 1 Rob. App. 627."

Divorce:  
Scotch law

"It has long been a fixed rule in the law of Scotland to disregard the peculiar rules of other countries with regard to marriage, and to give or withhold the remedy of divorce according to the rules applicable to a marriage in Scotland, thus giving to English parties a remedy which they would not have had from the tribunals of their own country, and occasionally denying to foreign parties the privilege which they would have had in their own country, where divorce may be obtained on grounds such as incom-

patibility of temper, or other grounds which the law of Scotland disregards."

"While the Scotch courts thus asserted their privilege of divorce, English law. even in the case of English parties, the English courts adhering to their own views of the indissolubility of an English marriage, treated the divorces so granted as a mere nullity. And accordingly, in the case of *Lolly, Russ. & Ry.* 239, where an English marriage had been dissolved by the Scotch courts, and the man, believing himself to be free, had returned to England and married a second wife, in a criminal suit for bigamy his plea, founded on the validity of the Scotch divorce, was repelled. On the other hand, in *Warrender v. Warrender*, June 26, 1834, 12 S. 847 and 885, aff. Aug. 1835, 2 S. and M'L. 154, Lord Brougham strongly condemned the English doctrine, and treated the view, that indissolubility was of the essence of the contract, as a mere *petitio principii*, founded on the fallacy of confounding the incident with the essence. But he professed to say that it was not necessary to impeach the authority of *Lolly's* case: that that judgment merely fixed the point that an English marriage 'could not be dissolved in the courts of any other country, for English purposes;' and that there was nothing legally impossible 'in a divorce being valid in the one country which the courts of another may hold a nullity;'—a result than which it is scarcely possible to conceive anything more unsatisfactory. But although there seems to have been a strong determination in England not to admit that the case of *Lolly* was wrongly decided, the judgment of the case of *Warrender* gave a final blow to the doctrine of the absolute indissolubility of an English marriage by the Scotch courts under any circumstances. Thereafter there is visible in the English courts an anxiety to introduce a new element, and to hold that Scotch divorces were only to be held as nullities where the parties had not at the time of the divorce a true domicile or domicile of succession in Scotland. This is apparent from the observations of Dr. Lushington in *Conway v. Beazeley*, 3 Hagg. Con. 639. See also *Tollemache*, July 9, 1860. As mere desertion is not admitted as a ground of divorce by the Act 20 & 21 Vict. c. 85, it seems doubtful whether a decree of divorce pronounced on that ground by a Scotch court would receive effect in England. If there be jurisdiction in the Scotch courts founded on the *bond fide* and permanent domicile of the husband in Scotland, the adultery on which the divorce is granted need not to have been committed in Scotland. But in cases where the parties have had a domicile simply of forty days in Scotland, the fact of the adultery

Jurisdiction in divorce.

being committed in this country has been held to support the jurisdiction which would otherwise have been excluded; *Oldaker v. Goldney*, Feb. 20, 1834, 12 S. 468. On the other hand, in *Jack v. Jack*, Feb. 7, 1862, 24 D. 467, an opinion was expressed by the majority of the whole Court that in questions of divorce on the ground of adultery, domicile forms the only ground of jurisdiction; and that neither the place where the contract was entered into nor the place where the adultery was committed is of any importance in the question of jurisdiction. *Ringer v. Churchills*, Jan. 15, 1840, 2 D. 307, fixes the principle that the domicile of the husband is the domicile of the wife only in the case where that domicile truly forms the husband's home in the ordinary sense of the word, as distinguished from the place in which he has only had a short and temporary residence, such as that of forty days, which would have grounded jurisdiction against himself. It may now be held that in order to make the domicile of the wife follow that of the husband, so as to found jurisdiction against her in the Scotch courts in a question of divorce, while she herself is *de facto* resident in England and has never received any personal citation in Scotland, the husband must have acquired such a domicile in Scotland as would regulate his succession in case of his dying there intestate: in other words, that he must have become *animo remanendi* a domiciled Scotchman; *Pitt v. Pitt*, July 19, 1862, 24 D. 1444, rev. 1 Macph. 106; 4 Macq. 627."—MOIR.

#### TIT. VII.—OF MINORS, AND THEIR TUTORS AND CURATORS.

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| (1, 2)<br>Pupillarity<br><br>Minority.<br>Majority. | <p>1. The stages of life principally distinguished in law are, pupillarity, puberty or minority, and majority. A child is under pupillarity from the birth till fourteen years of age if a male, and till twelve if a female. Minority begins where pupillarity ends, and continues till majority, which by the law of Scotland is the age of twenty-one years complete both in males and females; but minority, in a large sense, includes all under age, whether pupils or <i>puberes</i>. Because pupils cannot in any degree act for themselves, and minors seldom with discretion, pupils are put by law under the power of tutors, and minors may put themselves under the</p> |
|---|--|

direction of curators. Tutorship is a power and faculty to Tutory. govern the person and administer the estate of a pupil. Tutors are either *nominate*, *of law*, or *dativæ*, which answers to the *tutores testamentarii*, *legitimi*, and *dativi*, of the Roman law.

2. A tutor-nominate is he who is named by a father in Tutor-nominate. his testament or other writing to a lawful child. As the right of naming tutors proceeds from the fatherly power, (3) those who are named by a mother or stranger are not proper The father only can name tutors. tutors; their powers are limited to the special estate left to the pupil; and therefore, their being named cannot hinder the pupil from getting one who may defend his person, and manage his other estate. The nomination of tutors being entirely pendent on the will of the father, may be altered at his pleasure, even though it should have been engrossed in a writing, in its nature irrevocable, as a disposition. A tutor-nominate is not obliged to give caution for the faithful discharge of his office, because his fidelity is presumed to have been sufficiently known to the father.(m)

3. If there be no nomination by the father, or if the Tutor of law, tutors-nominate do not accept, or if the nomination falls by (4) death or otherwise, there is place for a tutor of law; so called because he succeeds by the mere disposition of law. This sort of tutorship devolved by the ancient Roman law, and devolves also by ours, upon the next agnate; but the word devolves on the next agnate. agnate is differently understood in our law and in theirs. Agnates, in the sense of the Roman law, were those whose Agnates, who? propinquity was connected by males only; in the relation of cognates, one or more females were interposed. We understand by agnates all those who are related by the father, even though females intervene; and by cognates those who are related by the mother.

4. Where there are two or more agnates equally near to (5) the pupil, he who is entitled to the pupil's legal succession falls to be preferred to the others, because it is presumed that he will be the most diligent in preserving the estate. But as Not intrusted with the person of the pupil.

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(m) Unless his condition shall change, and this be represented to the court; 1696, c. 8.

Form of de-  
claring a tutor  
of law.

the law suspects that he may not be over careful to preserve a life which stands in the way of his own interest, this sort of tutor is excluded from the custody of the pupil's person, which is commonly committed to the mother while a widow, until the pupil be seven years old; and in default of the mother, to the next cognate.<sup>(n)</sup> The tutor of law must be at least twenty-five years of age, 1474, c. 52. He is served or declared by a jury of sworn men, who are called upon a brief issuing from the Chancery, which is directed to any judge having jurisdiction; *Stuart v. Henderson*, March 8, 1636, M. 9585.<sup>(o)</sup> He must give security before he enters upon the management.<sup>(p)</sup>

Tutor-dative,

(8)

5. If no tutor of law demands the office, any person, even a stranger, may apply for a tutory-dative.<sup>(q)</sup> But because a tutor of law ought to be allowed a competent time to deliberate whether he will serve or not, no tutory-dative can be given till the elapsing of a year from the time at which the tutor of law had first a right to serve, i.e., till a year after the death of the deceased, if the father has named no tutors; and if he has named tutors who have accepted, a year after the nomination falls by the death or incapacity of the nominees. It is the King alone, as the father of his country, who gives tutors-dative, by his Court of Exchequer;<sup>(r)</sup> and no gift of tutory can pass in Exchequer without the citation or consent of the next of kin to the pupil, both by the father and mother, 1672, c. 2; nor till the

named by the  
King.

(9)

<sup>(n)</sup> The tendency of the more recent law is to leave the custody of children with the mother, even after this age; *Campbell v. Campbell*, March 7, 1833, 11 S. 544; Fraser, Par. & Ch., 2nd ed., 218; *Johnson v. Otto*, 11 D. 718; *A. B. v. C. D.*, 12 D. 1297. But if that would be disadvantageous to the children, they will be removed even at an earlier age; *Walker v. Walker*, March 10, 1824, 2 S. 788; *Buchan v. Cardross*, May 27, 1842, 4 D. 1268; *Denny v. M'Nish*, Jan. 16, 1863, 1 Macph. 268; *Muir v. Milligan*, July, 1868, 6 Macph. 1125.

<sup>(o)</sup> As to advocations of such briefs, see 1 & 2 Geo. IV. c. 38; 1 & 2 Vict. c. 86; *Goodwin v. Sawers*, June 5, 1841, F.C., and 3 D. 996, June 24, 1842, 4 D. 1451.

<sup>(p)</sup> See farther the Pupils' Protection Act, 12 & 13 Vict. c. 51, § 26.

<sup>(q)</sup> A person entitled to serve tutor-at-law has been appointed tutordative; *Urquhart, petr.*, March 2, 1860, 22 D. 932.

<sup>(r)</sup> Now by the Court of Session, 19 & 20 Vict. c. 56, § 19.

tutor gives security, recorded in the Books of Exchequer.

(g) There is no room for a tutor of law, or tutor-dative, while a tutor-nominate can be hoped for : and tutors of law, or dative, even after they have begun to act, may be excluded by the tutor-nominate, as soon as he offers to accept, unless he has expressly renounced the office ; *Campbell v. Campbell*, July 6, 1627, M. 16,246. If a pupil be without tutors of any kind, the Court of Session will, at the suit of any kinsman, name a factor (steward) for the management of the pupil's estate, who must conduct himself by the rules laid down Act S., Feb. 13, 1730.(t)

If there be no tutor-nominate or dative.

(3, 4)

(10)

Judicial factor for a minor.

6. After the years of pupillarity are over, the minor is considered as capable of acting by himself, if he has confidence enough of his own capacity and prudence. The only two cases in which curators are imposed upon minors, are—

Curators, in what cases imposed on minors.

(1) Where they are named by the father in *liege pourstie* (or in a state of health), in consequence of 1696, c. 8. (2)

Where the father is himself alive ; for a father is *ipso jure*, without any service, administrator, that is, both tutor and curator of law to his children, in relation to whatever estate may fall to them during their minority. This right in the father does not extend to grandchildren ; *L. Lamington v. Jolly*, M. 16,306 ; nor to such even of his immediate children as are forisfamiliaried, *arg. Mackenzie v. Fairholm*, 1666, M. 8959, 8961 ;(u) neither has it place in subjects which are left

The father is tutor and curator to his children.

(l. 6. 54)

(s) See 12 & 13 Vict. c. 51, § 25.

(t) "The powers of such factors are much the same as those of tutors of law ; and their duties and responsibilities are defined by the Acts of Sederunt, July 31, 1790, Dec. 25, 1718, and Feb. 13, 1730, and by the recent Act 12 & 13 Vict. cap. 51 (Pupils Protection Act). The facility of obtaining these appointments, if assented to by those who have the chief interest in the pupil's succession or welfare, is daily increasing their number and diminishing that of applications for a tutory of law. And as the tutory at law was gratuitous, while the factor *loco tutoris* is remunerated by fixed fees, the latter is on the whole more satisfactory. 'I like factors *loco tutoris*,' said Lord Auchinleck (Hailes, p. 360), 'for they serve for hire, and consequently better than those who serve for conscience' sake.'"—MOIR.

(u) It has been held that the mere fact of marriage does not amount to forisfamiliaried ; *Anderson v. Cation*, Nov. 28, 1828, 7 S. 78, Nov. 15, 1832, 11 S. 10 ; see Fraser, Par. & Ch., 2nd ed., 349, 350.

by a stranger to the minor, exclusive of the father's administration. If the minor chooses to be under the direction of curators, he must raise and execute a summons citing at least two of the next of kin to appear before his own judge-ordinary,(v) upon nine days' warning, 1555, c. 35. At the day and place of appearance, he offers to the judge a list of those whom he intends for his curators: such of them as resolve to undertake the office must sign their acceptance,(w) and give caution; upon which an act of curatory is extracted.

Curator *ad lites*.

(13)

Who debarred from tutory and curatory. Women, in what cases.

(12, 29)

7. These curators are styled *ad negotia* to distinguish them from another sort called curators *ad lites*, who are authorised by the judge to concur with a pupil or minor in actions of law, either where he is without tutors and curators, or where his tutors or curators are parties to the suit.(x) This sort is not obliged to give caution, because they have no intermeddling with the minor's estate: they are appointed for a special purpose; and when that is over, their office is at an end; *Baird, &c., petrs.*, Jan. 13, 1741, M. 16,346. Women were, by the Roman law, debarred from the offices both of tutory and curatory, except in special cases: with us they are capable, under the following restrictions—(1) The office of a female tutor or curator falls by her marriage, even though the nomination should provide otherwise; for after she is herself subjected to the power of a husband she is incapable of having any person under her

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(v) The proceedings may be either before the sheriff or the Court of Session.

(w) See as to the conclusiveness of a minute of acceptance signed by testamentary tutors by initials, but not acted on, *Bruce v. Hamilton*, Dec. 23, 1854, 17 D. 265. It would seem that acceptance may be *rebus ipsis et factis*, *ib.*

(x) This is done only when the pupil has come into Court. If it is not done the decree is not null, but has only the effect of a decree in absence; *Sinclair v. Stark*, Jan. 15, 1828, 6 S. 336; *Sinclair v. Brown*, March 3, 1835, 13 S. 594, H. of L., July 17, 1835, 2 S. & M'L. 103 heard on remit, March 9, 1837, 15 S. 770; *Agnew v. E. of Stair*, July 31, 1822, 1 S. Ap. 333. Proceedings against a pupil who has tutors, in which they are not made parties in the summons, even although they appear in another character, are reducible; *Craven v. Elibank's Trs.*, March 9, 1854, 16 D. 811.

power; *Stuart v. Henderson*, March 8, 1636, .M. 9585.(y)

(2) No woman can be tutor of law: for that sort is marked out, purely on the score of blood, without any regard to personal qualities. Papists are declared incapable of tutory Papists. or curatory by 1700, c. 3.(z) Where the minor has more tutors and curators than one, who are called in the nomination to the joint management, they must all concur in every act of administration: where a certain number is named for a quorum, that number must concur: where any one is named *sine quo non*, no act is valid without that one's special concurrence.(a) But if they are named without any of these limitations, the concurrence of the majority of the nominees then alive is sufficient.

What number must concur.

(15)

8. In this, tutory differs from curatory, that as pupils are incapable of consent, they have no person capable of acting, which defect the tutor supplies;(b) but a minor *pubes* can act for himself. Hence the tutor subscribes alone all deeds of administration; but in curatory it is the minor who subscribes as the proper party; the curator does no more than consent. Hence also the persons of pupils are under the power either of their tutors or of their nearest cognates; but the minor, after pupillarity, has the disposal of his own person, and may reside where he pleases; *Scott v. Kennedy*, 1675, M. 8970. In this sense the rule of the Roman law may be understood, *tutor datur personæ, curator rei*. In most other particulars, the nature, the powers, and the duties of the two offices coincide. Both tutors and curators must, previous to their administration, make a judicial inventory,(c) subscribed by them and the next of kin, before

Difference betwixt tutory and curatory.

(14)

Tutorial and curatorial inventories.

(y) *Stoddart v. Rutherford*, June 30, 1812, F.C. Neither will the Court in general appoint a woman to be *factrix loco tutoris*; not even a mother to her own children; *Galloway*, Feb. 1, 1855, 17 D. 321.

(z) Repealed by 10 Geo. IV. c. 7, § 10 (Roman Catholic Relief Act).

(a) *Vere v. Hyndford*, 1791, M. 16,738, Bell's 8vo Ca. 554; Bell's Fr. 2074.

(21, 32)

(b) "A tutor acts for the pupil, who is himself considered nobody; whereas a minor acts with his curator;" *Dalgleish v. Hamilton*, 1752, M. 2184.

(c) In regard to this, tutors *dative* and at law, *factores loco tutoris*, curators *bonis*, and ordinary curators, are now subject to the provisions of the

Penalties of neglecting to make up.

the minor's judge-ordinary, of his whole estate, personal and real; of which one subscribed duplicate is to be kept by the tutors or curators themselves; another by the next of kin on the father's side; and a third by the next of kin on the mother's. If any estate belonging to the minor shall afterwards come to their knowledge, they must add it to the inventory within two months after their attaining possession thereof. Should they neglect this, the minor's debtors are not obliged to make payment to them; they may be removed from their offices as suspected, and they are entitled to no allowance for the sums disbursed by them in the minor's affairs, 1672, c. 2; which last penalty does not reach to the expense laid out upon the minor's entertainment, or upon his lands and houses, Act S., Feb. 25, 1693, nor even to sums expended in completing his titles, July 18, 1707, *Yeaman v. Grieves*, M. 16,323.(d)

Powers of tutors and curators in acts of administration;

(16, 24)

9. Tutors and curators have power to sue for and levy the minor's rents, interest, and even principal sums, if his necessities call for it; to grant acquittances to the debtors, and to name factors or stewards, with reasonable salaries. They may remove tenants, and grant leases of the minor's lands, to endure as long as their own office;(e) but not under the former rental, without either a warrant from the Court of Session, or some apparent necessity; see *Ayton's Tutor*, M. 7425. But though they can use all diligence against the minor's debtors, the minor's creditors can use no

Pupils Protection Act, 12 & 13 Vict. c. 51, which requires them within six months to lodge with the Accountant of Court a rental, list, and inventory of the ward's estate. They cannot enter on the duties of their office till this is done. Afterwards they render annual accounts to the Accountant, which must specify any new claims or property that have been discovered.

(d) "This in practice has been held only to apply to the expense of lawsuits and legal diligence. The failure to give up inventories has in itself been held to be sufficient ground for the removal of the tutor: *Gibson and Thomson v. Sharp and Robb*, Dec. 21, 1811, F.C."—MOIR.

(e) The Pupils Protection Act (12 & 13 Vict. c. 51, § 7) sanctions the granting of leases by tutors and curators under the sanction of the Court, obtained on summary petition, for a period beyond the endurance of their office. The Court also authorises tutors-nominate to grant leases of ordinary duration; *Brown's Tutors*, July 16, 1867, 5 Macph. 1046, see note (h).

execution against them for payment of the debts due by the minor; for these are the minor's proper debts, and it cannot be known till accounting whether the tutors or curators have in their hands any funds belonging to the debtor; yet they may be charged for the performance of facts in their own power—*e.g.*, to make a subject forthcoming to renew investitures to the heirs of vassals, &c.(f)

10. They have power to sell the minor's moveables, without which his personal estate would frequently be lost to him. They were by the Roman law denied the power of aliening land estates without the authority of a judge; L. 1, § 2, *de reb. eor. qui* (27, 9); but that law obtains with us only in the case of tutors;(g) for the alienation of heritage by a minor with consent of his curators is valid *sine decreto prætoris*; Stair i. 6. 44; *Cred. of Clerk v. Gordon*, Dec. 6, 1699, M. 3668.(h) This restraint upon tutors does not reach to such alienations as law can compel the pupil to grant—*e.g.*, to renunciation of wadsets upon redemption by the reverser; *Graham v. E. March*, Jan. 31, 1735, M. 16,339; nor to the renewing of charters to heirs; but such charters must

in selling  
moveables;

(17)

in aliening  
land estates;

(f) On the analogy of the law applicable to trustees (*Lumsden v. Buchanan*, Feb. 26, 1864, 2 Macph. 695, rev. June 22, 1865, 3 Macph. H.L. 89, 4 Macq. 950), it must now be held that a tutor will be personally liable if in that capacity he invests money in a joint-stock company, or signs bills, or contracts debt; see *Fraser, P. & C.*, 2nd ed., 276. *Mackenzie*, Dec. 13, 1866, 5 Macph. 158, is a case where authority to sell the heritage of pupils was granted to a tutor-nominate, but as such tutors find no caution, it was arranged that a *curator bonis* should be appointed and receive the price.

(g) The Court will not grant such power where it is merely very beneficial to the pupil, but only where it is "necessary to save the ward or his estate from actual loss;" *Vere v. Dale*, 1804, M. 16,389; *Boyle*, Feb. 19, 1853, 15 D. 420; *White*, March 7, 1855, 17 D. 599.

(h) See *Wallace v. Wallace*, March 8, 1817, F.C. "Curators may, in conjunction with the minor, grant leases to extend beyond the years of minority, or they may sell or burden his heritable estate; see *Campbell v. Campbell*, Feb. 17, 1738, M. 8930. But it has been held that a minor with consent of curators cannot competently discharge a debt without actually receiving payment, which, on equitable grounds, is intelligible; that he cannot *gratuitously* alter a destination in the existing settlements of an estate; *Marquis of Clydesdale*, Jan. 26, 1726, M. 8964; nor execute a disposition of heritage *mortis causa*; *Cunyngham v. Whitefoord*, 1797,

convey no right to the heir which the former vassal had not.(i)

in transacting  
or submitting  
claims.

(18)

11. Tutors and curators may transact doubtful claims of moveable(j) subjects, in which the minor's interest is concerned, or refer them to arbiters; which transactions, or decrees-arbitral, law will support, if the minor be not thereby enormously prejudiced; *Ayton v. Scot*, Jan. 18, 1711, M. 14,997; *Aikenhead v. Aikenheads*, Nov. 14, 1711, M. 16,331. Tutors cannot alter the nature of the pupil's estate so as to invert the former order of succession—e.g., by renewing his bonds with new clauses, secluding executors; *Reid v. Berkley*, July 12, 1688, M. 16,312; but they may, if the pupil's security requires it, take an heritable bond in place of a personal; *Sharp v. Crichton*, July 19, 1671, M. 16,285.(k) It would seem that a minor may, with consent of his curators, change a bond from moveable to heritable, since he can by himself dispose of a moveable bond by testament. Neither tutors nor curators can, contrary to the nature of their trust, (be *auctores in rem suam*), authorise the minor to do any deed for their own benefit; nor can they acquire any debt affecting the minor's estate.(l) And where a tutor or curator makes such acquisition in his own name, for a less sum than the right is entitled to draw, the benefit thereof accrues to the minor, though the right should have been bought with the tutor's own money, or though the conveyance

Tutor cannot  
be auctor in  
rem suam.

(19)

Tutors are  
trustees;

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M. 8966. The first of these judgments may be explained by supposing that such discharges without consideration are looked on as obtained by fraud, and are reduced as gratuitous."—MOIR.

(s) Nor to cases where the father has bound himself to dispoise heritage; *E. Aberdeen v. Laird*, Nov. 26, 1823, 2 S. 527. Even where tutors-nominate had express power to sell, the Court required evidence of the expediency of doing so before granting authority; *Parrot v. Fraser*, 1810, Hume 889.

(j) It is not clear that a tutor has such power as to heritage; Bell on Arbitration, 2nd ed., 105; Fraser, P. & C., 2nd ed., 244, 245.

(k) Whatever they do in changing securities for the pupil's benefit has no effect on his succession; *Morton v. Young*, Feb. 11, 1813, 17 F.C. 179; *Adv.-Gen. v. Anstruther*, Dec. 22, 1843, 13 D. 450.

(l) The applications of this principle are very numerous in regard to persons holding fiduciary offices of all kinds; see, e.g., *Perston v. Perston's*

to him should purport that the granter signed it from the favour he had to the tutor himself; *Cochran v. Cochran*, Feb. 17, 1732, M. 16,339.(m)

12. It is the duty of tutors and curators to take proper care of the minor's person and education, and to disburse the expense necessary for that purpose. Tutors ought not to employ a yearly sum exceeding the interest of the minor's stock, or the rent of his estate, for his education and maintenance; but curators(n) may encroach on the stock itself, where it is small, or even employ the whole of it, if less will not do, for putting the minor in a way of business; *Duncan-son v. Duncanson*, 1715, M. 8928. It is also their duty to employ the minor's rents and interests profitably. The sums which belonged to the minor before their entry into the office, if they carried no interest, ought to be put out at interest within a year thereafter; the rents of his land estate which fall during the office are also to be lent upon interest within a year after they are payable; *Irvine v. Spence*, Jan. 16, 1696, M. 501. But the interest arising on bonds, *pendente tutela*, need only be accumulated into a principal sum at the expiration of the office; *ibid.*(o) If a right of succession should open to the minor during the office, the same rules must be observed in relation to the subject thereof, as if it had opened before the commencement of the office.

13. By the Roman law tutory and curatory, being *munera publica*, might be forced upon every one who had not a relevant ground of excuse; but with us the persons named to these offices may either accept or decline; and

*Trz.*, Jan. 9, 1863, 1 Macph. 245; *Cochrane v. Black*, Feb. 1, 1855, 17 D. 321, July 16, 1857, 19 D. 1019; *Elphinstone v. Robertson*, May 28, 1814, F.C.; *Anderson v. Cation*, Nov. 28, 1828, Nov. 15, 1832, 11 S. 10.

(m) *Wright v. Hamilton*, Feb. 26, 1839, rev. Aug. 2, 1842, 1 Bell's App. 574. The general rule applies also to trustees. See *infra*, Note A, at end of b. iii. t. 9.

(n) Or tutors; *Blairs v. Mitchell*, 1802, M. 16,388; *Thomson v. Waddell*, June 16, 1812, 16 F.C. 682; *Kennedy*, June 28, 1860, 22 D. 567.

(o) The rules as to accounting and investment of pupil's estate are now different. There must be an annual balance. Bank interest is to be given *de die in diem* on all money received to the end of the year, when a

their duty in regard to the minor's person;

(24)

in regard to the management of his money;

(25)

their obligation to diligence after acceptance.

(20)

where a father, in *liege poustie*, names certain persons both as tutors and curators to his children, though they have acted as tutors, they may decline the office of curatory, 1696, c. 8. Tutors and curators having once accepted are liable in diligence—that is, are accountable for the consequences of their neglect in any part of their duty from the time of their acceptance; *Scrimgeour v. Wedderburn*, 1675, M. 6357; insomuch that, though they have not had the least intromission with the minor's estate, they are accountable as if they had intermeddled. They are therefore liable to the minor for the debts due to him, if, so soon as a debtor is known to decline in his affairs, they neglect the proper diligence against his estate; *Steven v. Boyd*, July 9, 1667, M. 500, 16,277; and if that will not do, personal diligence by a charge upon letters of horning; but they ought not to throw away the minor's money unprofitably against a debtor who has no fund of payment; *Hamilton v. Hamilton*, July 2, 1628, M. 3502.(p) Tutors and curators are accountable, *singuli in solidum*—i.e., every one of them is answerable, not only for his own diligence, but for that of his co-tutors—and any one may be sued without citing the rest; but he who is condemned in the whole has action of relief against his co-tutors.(q)

They are liable  
*singuli in solidum*.

(27)

Pro-tutors and  
Pro-curators.

(28)

14. This obligation to diligence reaches to pro-tutors and pro-curators,—persons who act as tutors or curators without having a legal title to the office. These have none of the active powers or privileges competent to tutors or curators. They cannot pursue the minor's debtors for payment, nor

balance is made. After deducting current expenses, the remainder of the annual balance must be lent out at the current interest obtained for heritable securities. Tutors and curators must account for the actual profits realised on the ward's funds, even though greater than such interest; *Montgomerie v. Wauchope*, April 8, 1816, 4 Dow, 109; June 4, 1822, F.C. & 1 S. 453; *Cochrane v. Black*, Feb. 1, 1855, 17 D. 321; see 12 & 13 Vict. c. 51, § 25; Fraser, P. & C., 2nd ed., 235.

(p) *Condie v. Stewart*, Nov. 20, 1834, 13 S. 61.

(q) "It can scarcely be said to be yet settled whether tutors are liable *singuli in solidum*; Ersk. i. 7, 27; Fraser, P. & C., 2nd ed., 303, 372; Bell's Pr. 2085; More's Notes, 38. But it is in the father's power to exclude doubt on the subject."—MOIR. See § 14.

will their acquittances exonerate the debtors, unless the sum paid to them has been (*in rem versum*) profitably applied to the minor's use; but they are subjected *passivè* to all the obligations that lie on tutors and curators; Act. S., June 10, 1665; see *Swinton v. Notman*, M. 16,273.(r) From this obligation to diligence we may except—(1.) Fathers, or administrators-in-law, who, from the presumption that they act to the best of their power for their children, are liable only for actual intromissions. (2.) Tutors and curators who are named by the father in *liege pousitie*, in consequence of 1696, c. 8, with the special provisos that they shall be liable barely for intromissions, not for omissions, and that each of them shall be liable only for himself, and not *in solidum* for the co-tutors;(s) but this power of exempting the nominees from diligence is by the Act limited to the estate descending from the father himself.(t)

What tutors  
are exempted  
from diligence.

(26, 27, and  
vi. 55)

15. The action by which a minor may compel his tutors to account for their administration is called *actio tutelæ directa*. It does not lie till the office expires; because, as they have the complex management of the minor's whole affairs, a judgment cannot be formed on any one part till all be wound up; but pro-tutors and pro-curators may be sued by the minor at any time.(u) Tutors and curators can com-

*Actio tutelæ  
vel curatælæ  
directa.*

(31, 32)

*Actio con-  
traria.*

(r) It is not every management of the affairs of a pupil that will infer a pro-tutory, but only such as is *qua* tutor—i.e., when one acts under the character of tutor when he is not; *Fowler v. Campbell*, 1739, M. 16,343, Elch., "Tutor," 11; *Fultons v. Fulton, &c.*, March 21, 1864, 2 Macph. 893.

(s) In like manner, trustees are liable only for their own acts and intromissions, and not for those of co-trustees or for omissions; see 24 & 25 Vict. c. 84, § 1, and Note A, at end of b. iii. t. 9.

(t) A minor in choosing curators cannot exempt them from the consequences of omissions; *Watson v. Rae*, 1773, M. 16,369.

(u) Tutors-at-law, tutors-dative, and curators to insane persons, as well as judicial factors, now account under the provisions of the Pupils Protection Act (12 & 13 Vict. c. 51), and may obtain a discharge by presenting a petition to have their accounts judicially audited, under § 34 of that Act. It is doubtful whether they can obtain discharge by action, which is the course applicable to tutors and curators, who do not fall under the statute; *Marjoribanks*, Nov. 25, 1846, 9 D. 168; *Campbell v. Grant*, Dec. 1, 1869, 8 Macph. 227.

pel the minor to repay what they have profitably expended for him during the administration, by the *actio tutelæ contraria*. In this action they must exhibit to the Court the account, charge and discharge, betwixt them and the minor; because, till accounting, they are presumed *intus habere*, to have effects of the minor in their own hands sufficient for answering their disbursements. They cannot, in this action, charge against the minor any salary or allowance for pains, unless a salary has been expressly contained in the testator's nomination, for their office is presumed gratuitous; *Scot v. Strachan*, Feb. 19, 1736, M. 13,433, 16,341, Elch. "Tutor," 4.(v)

How tutory  
and curatory  
expire.

(29)

Tutors may be  
removed as  
suspect.

16. Though no person is obliged to accept of the office of tutor or curator, yet, having once accepted, he cannot throw it up or renounce it without sufficient cause; 1555, c. 35.(w) But if he should be guilty of misapplying the minor's money, or fail in any other part of his duty,(x) he may be removed by the *actio*, or rather *accusatio suspecti tutoris*, which was by the Roman law *popularis*, but with us can be pursued only by the minor's next of kin,(y) or by a co-tutor or co-curator. By the last quoted Act the judge-ordinary was competent to this complaint, but by our later custom it must be tried by the Court of Session; and it may be brought before them summarily,(z) in the special case of tutors

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(v) *Fegan v. Thomson*, July 20, 1855, 17 D. 1146; *Gray, &c.*, Nov. 12, 1856, 19 D. 1. As to the decennial prescription applicable to such accountings, see Act 1696, c. 9, and *infra*, iii. vii. 9.

(w) Such as infirm health; *Munnoch*, July 7, 1837, 15 S. 1267. By the Pupils Protection Act, the Court of Session is authorised, on cause shown, to remove or accept the resignation of tutors-at-law, tutors-dative, and curators of insane persons (12 & 13 Vict. c. 51, §§ 26, 31).

(x) As in failing to give in inventories, 1672, c. 2; *Gibson & Thomson v. Sharp*, Dec. 21, 1811, 16 F.C. 454; see *Reoch v. Robb*, Nov. 14, 1817, F.C.

(y) The mother, or any near relation of the pupil, may be the pursuer of such an action; *Stair*, i. 6, § 26; *Austin v. Wallace*, Dec. 21, 1826, 5 S. 177; *Welsh v. Welsh*, 1778, M. 16,373, Hailes, 778, 5 B. S. 634.

(z) Tutors and factors subject to 12 & 13 Vict. c. 51, may be removed upon the mere report of the Accountant of Court; *Dewar*, Dec. 8, 1853, and Feb. 7, 1854, 16 D. 163, 489.

named in consequence of the Act 1696, c. 8. Where the misconduct proceeds merely from indolence or inattention, the Court, in place of removing the tutor, either join a curator with him; *Macbrae v. MacLaine*, July 8, 1667, M. 16,278; or, if he be a tutor-nominate, they oblige him to give caution for his past and future management; *Balfours v. Forresters*, Feb. 16, 1705, M. 16,320.

What if their misconduct be not wilful.

17. The offices of tutory and curatory expire(a) also by the pupil's attaining the age of puberty, or the minor's attaining the age of twenty-one years complete, and by the death either of the minor or of his tutor or curator. If two or more tutors or curators are called to the joint management, the gift or nomination has no force till all of them accept, and it falls upon the death of any one of them; *Drummond v. Feuars of Bothkennel*, Jan. 17, 1671, M. 14,694. The non-acceptance, or supervening incapacity,(b) or death of a *sine quo non*, has the same effect.(c) And this holds, not only in curatories, but in the nomination of tutors by a father, notwithstanding the presumption that the father would have trusted any of the tutors named rather than the tutor of law; *Aikenhead v. Durham*, June 24, 1703, M. 14,701. Where they are named in general terms, the nomination subsists if any one accepts; and upon the death of any one, the office accrues to the survivor; *Young v. Watson & Syme*, Nov. 7, 1740, M. 16,346.

In what case tutory falls by the death of any one of the tutors.

(30)

18. Deeds either by pupils, or by minors having curators without their consent, are null;(d) but they oblige the

The effect of deeds by minors.

(33)

(a) A discharge granted by persons as tutors after the expiry of their office is null, and they are bound to relieve those to whom it is granted of all loss incurred through it; *Lockhart v. M'Kenzie's Trs.*, Dec. 15, 1826, aff. June 24, 1829, 3 W. & S. 481. Tutors and curators acting after the expiry of their office incur the liabilities of pro-tutors and pro-curators.

(b) The office of tutor or curator in a female falls by her marriage; *ante*, § 7.

(c) But the intention of the testator must be very clearly expressed; see *Scott v. Scott*, 1775, M. 16,371, 5 B. S. 633; Hailes 621.

(d) The general doctrine of the nullity of acts done by a minor without his curators undergoes some qualification; as, for instance, where the minor enters into trade or grants a bill; and an antenuptial contract entered into by a minor having curators without their consent,

granters in as far as relates to sums profitably applied to their use. A minor under curators can indeed make a testament by himself; *Stevenson v. Allans*, Nov. 30, 1680, M. 8949; but whatever is executed in the form of a deed *inter vivos* requires the curator's consent; *Craig v. Lindsay, &c.*, Dec. 14, 1757, M. 8956. Deeds by a minor who has no curators are as effectual as if he had had curators and signed them with their consent; he may even alien his heritage without the interposition of a judge; *Thomson v. Stevenson*, Dec. 13, 1666, M. 8982.(e)

Restitution of  
minors.

(34)

19. Minors may be restored against all deeds granted in their minority that are hurtful to them. Deeds in themselves void need not the remedy of restitution; but where hurtful deeds are granted by a tutor in his pupil's affairs, or by a minor who has no curators, as these deeds subsist in law, restitution is necessary: and even where a minor having curators executes a deed hurtful to himself with their consent, he has not only action against the curators, but he has the benefit of restitution against the deed itself, both by the Roman law, L. 2, 3, *C. si tut. vel cur. interv.* (2, 25), and by ours, *Blantyre v. Walkinshaw*, July 2, 1667, M. 8991.

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was held not reducible without proof of lesion; *Bruce v. Hamilton*, Dec. 23, 1854, 17 D. 265.

(e) He cannot *mortis causa* convey his proper heritage, but that rule does not embrace things that are heritable merely *destinatione*; *Brand's Trustees*, Dec. 19, 1874, 2 R. 258. As to payments of money to a minor having no curators, see *Fraser, P. & C.*, 2nd ed., 431. "He may sell his heritable property, and of course exercise all the inferior and subordinate rights relating to heritable property; and *a fortiori*, as to moveables, which have generally been regarded by the law of Scotland as involving a less exercise of power, he may dispose of, gift, test upon, burden, or deal with these as he pleases; he may be imprisoned for the performance of an obligation, or, as it is called in the law of Scotland, *ad factum prestandum*; or, for an ordinary civil debt, he may be rendered bankrupt or sequestrated; he can sue and defend in his own name; renounce a succession to which he was heir, or incur a passive title by vitious intromission, which neither a pupil nor his tutor can. In short, so far as regards those with whom he contracts, his writs or acts have the same legal force as those of any one who has attained majority, and are merely exposed to the risk of an after-challenge on the ground of minority combined with lesion, i.e., proved injury to the minor."—MOIR.

The minor cannot be restored if he does not raise and execute a summons for reducing the deed, *ex capite minorennitatis et lassionis*, before he be twenty-five years old. (h) Within what time it must be sought. (35)

These four years, between the age of twenty-one and twenty-five, called by us *quadriennium utile*, are indulged to the minor, that he may have a reasonable time from that period, when he is first presumed to have the perfect use of his reason, to consider with himself what deeds done in his minority have been truly prejudicial to him. This action must be pursued within the *quadriennium*, not only against third parties, but against the tutors or curators who have granted or consented to the deeds excepted to; though the action of tutory does not prescribe in less than ten years; *Cunningham v. His Curators*, 1727, M. 16,338.

20. Questions of restitution are proper to the Court of Its requisites. Session. Two things must be proved by the minor in order (36, 38) to the reduction of the deed—(1) That he was a minor when it was signed: of this, an extract of the minor's baptism from the kirk-session books is generally received as sufficient evidence, either by itself (*L. Logan*, 1722, not reported), or joined with the most slender collateral circumstances (*Thomson v. Stevenson*, 1666, M. 8982). (2) That the minor is hurt or lesed by the deed: this lesion must not proceed merely from accident; for the privilege of restitution was not intended to exempt minors from the common misfortunes of life; it must be owing to the imprudence or negligence of the minor or his curator. For this reason, though a minor may be restored against the sentence of a judge, where the proper allegations or defences for him have been omitted, or hurtful ones offered in his name, *Murray v. Chalmers*, Dec. 7, 1705, M. 9001; yet, if the minor's plea has been well conducted, there is no place for restitution, though (1) The granter's minority. (2) His lesion must be owing to imprudence.

(h) The lapse of the *quadriennium utile* is no bar to the challenge of a deed which is an entire nullity, such as a deed granted by a pupil, or by a minor in favour of or for the benefit of his curator, whose consent to such a deed is "no consent;" *Thomson v. Pagan*, 1781, M. 8985; *M'Gibbon v. M'Gibbon*, March 5, 1852, 14 D. 605; *Manuel v. Manuel*, Jan. 15, 1853, 15 D. 284. As a general rule, a reduction must be brought, and not merely an exception of minority and lesion stated within the *anni utiles*; *Stewart v. Snodgrass*, Dec. 20, 1860, 23 D. 187.

the sentence should have been iniquitous; *Kincardine v. Murray*, Jan. 7, 1698, M. 9016.(i)

- How excluded. 21. A minor cannot be restored (1) against his own delict  
 (36) or fraud, *e.g.*, if he should induce one to bargain with him  
 (39) by telling him he was major.(k) (2) Restitution is excluded  
 if the minor, at any time after majority, has approved of  
 the deed, either by a formal ratification, or tacitly by pay-  
 ment of interest, or by other acts inferring approbation.(l)  
 (38) (3) A minor who has taken himself to business as a mer-  
 chant, shopkeeper, &c., cannot be restored against any deed  
 granted by him in the course of that business; *Galbraith v.*  
*Lesly*, June 20, 1676, M. 9027; especially if he was *proximus*  
 (40) *majorennitatis* at signing the deed.(m) (4) According to the  
 more common opinion, a minor cannot be restored in a ques-  
 tion against a minor, unless some gross unfairness shall be  
 (39) qualified in the bargain. *Lastly*, A minor could not, by our  
 old law, have been restored if he had sworn not to reduce the  
 deed, agreeably to the constitution of Frederick; Auth. L.  
 1, *C. si adv. vend.* (2, 27). But by 1681, c. 19, the elicitors  
 of such oaths are declared infamous, and reduction is made  
 competent to any of the minor's relations, lest himself should

(i) See as to this case *per* Hope, J.-C., in *Craven v. Elibank's Trs.*, March 9, 1854, 16 D. 821. The doctrine that a minor is entitled to restitution against a defence competent and omitted, must be received with some reserve; see *Oakley v. Telfer*, 1705, M. 9019; *Anderson v. Geddes*, 1732, M. 9020; *Shedden v. Patrick*, March 11, 1852, 14 D. 735; *rev.* on different grounds, 1 Macq. 535.

(k) *Wilkie v. Dunlop*, Feb. 28, 1834, 12 S. 506: or by falsely holding out another party concurring in the deed as his curator; *Harvey v. M'Intyre*, March 7, 1829, 7 S. 561.

(l) But where there is evidence *in gremio* of fraud, or the minor's creditors have already challenged it, a ratification after majority will receive no effect; *Leiper v. Cochran*, July 9, 1822, 1 S. 552; *Harkness v. Graham*, June 20, 1833, 11 S. 760.

(m) *Keddell v. Duncan*, June 5, 1810, F.C.; *Crawford v. Bennett*, June 19, 1827, 3 W. & S. 608. But a balance on speculative transactions in railway shares due by a minor living with his father and employed as a mercantile clerk, was held not to fall within this rule, and not to be a good debt against the minor; *Dennistoun v. Mudie*, Jan. 31, 1850, 12 D. 613.

be backward to reduce, in his own name, a deed which he had sworn never to call in question.

22. The privilege of restitution does not always die with the minor himself; if one should die in minority, or within the *quadriennium utile*, the right transmits to his heir, according to the following rules:—1. If a minor succeeds to a minor, the time allowed for restitution is governed by the minority of the heir, not of the ancestor. 2. If a minor succeeds to a major who was not full twenty-five, the privilege continues with the heir during his minority; but he cannot avail himself of the *anni utiles*, except in so far as they were unexpired to the ancestor at his death. 3. If a major succeeds to a minor, he has only the *quadriennium utile* after the minor's death; and if he succeeds to a major dying within the *quadriennium*, no more of it can be profitable to him than what remained when the ancestor died; L. 18, § 5; L. 19, *de minor.* (4, 4); L. 5, *C. de temp. in. int. restit.* (2, 53); *Macmath v. Baron of Broughton*, March 14, 1628, M. 9040. How far transmitted to the heir. (42)

23. Restitution has the effect to make everything return *hinc inde* to its former state. If matters are not entire, and so cannot be restored on both sides, the minor is not entitled to restitution against such contracts as the other party has been, by the necessity of law, compelled to enter into with him; *Gordon's Crs. v. Towy*, Dec. 1, 1708, M. 9031; but in voluntary contracts the minor will be restored, without being obliged to put the other party in his own place, unless he can do it without damage to himself. See *Blantyre v. Walkinshaw*, 1667, M. 8991.(n) Effect of restitution. (41)

24. *Minor non tenetur placitare super hæreditate*; R. M., l. 3, c. 32, § 15; Stat. Gul., c. 39. No minor can be compelled to state himself as a defender in any action whereby his heritable estate may be evicted from him by one pretending a preferable right. Though the direct right contested should belong to a major, the minor may plead this privilege, if the eviction of his heritage should be the consequence of reducing the major's right; *Pringle v. Ker and* Minor non tenetur placitare. (43-45)

(n) *I.e.*, the minor is bound to reimburse the other for what has been in rem verum of him only; Bell's Com. i. 136.

Limitations of  
this rule.

*Home*, June 23, 1625, M. 9059. The privilege, indeed, as it is personal to the minor, cannot be pleaded in such a case by the major; *Hamilton v. Matheson*, Nov. 25, 1624, M. 9057; but then no sentence pronounced in the action against the major can affect the minor, who is not bound to appear in the suit. Our later lawyers, in explaining this rule, have restricted it to *hæreditas paterna*; under which Visc. Stair, i. 6, § 45, comprehends all heritage flowing from any ascendant in the right line, whether by the father or the mother. Heritage flowing from collaterals, as brothers, uncles, &c., has been, beyond all controversy, excluded from the rule for some centuries past. By *heritage* is to be understood a complete feudal right; so that the rule has no place in rights not perfected by seisin, where seisin is necessary to perfect them; *Kello v. Pringle*, Jan. 31, 1665, M. 9063;(o) unless either the right has been completed by seisin in the person of the father's author; *Pringle v. Ker*, June 23, 1625, M. 9059; or the father or his author have done all they could to obtain seisin; *Fleming v. Carstairs*, 1683, M. 9070. Leases, not being in their nature perpetual, fall not under this rule; but rights, though they be incorporeal, if they are feudal, *e.g.*, rights of patronage, and even redeemable rights, are included in it, where the action brought against the minor is intended to impeach them, or set them aside upon any ground of nullity; *Davidson v. Alcorn*, Nov. 21, 1694, M. 9072.(p)

(46)

25. This privilege is intended merely to save minors from the necessity of disputing upon questions of preference; it does not therefore take place where the action is pursued on the father's falsehood or delict; *Crawfurd v. Crawfurd*, Dec. 27, 1711, M. 1902, Robertson's App. 28;(q) nor upon

(o) This limitation is unnecessary, as the maxim applies only to heritage capable of infeftment; Stair, i. 6, 45; Bell's Pr. 2101.

(p) This is too broad, for where the ancestor's title is subject to an *ex facie* nullity, which may be stated *exceptione*, there is no *hæreditas*; *Donaldson v. Donaldson*, 1749, 5 B. S. 236, M. 9080; Elch. "Blank Writ," 2; *Tomison v. Tomison*, Feb. 27, 1840, 12 Jur. 382.

(q) *Macfarlane v. Hume*, 1797, M. 9087, where it was said that the "Court have had no occasion in the present age to consider the application of the maxim founded on;" and, in argument, that it "was more a matter of antiquity than practice."

his obligation to convey heritage; *Mackenzie v. Mackenzie*, July 25, 1710, M. 9101; nor on his liquid bond for a sum of money; R. M., l. 3, c. 32, § 16; though such action should have the effect to carry off the minor's estate by adjudication. Neither has it room in actions brought against the minor for settling marches, nor in actions of molestation *in possessorio*; *Hartshaw v. Hartwoodburn*, 1666, M. 9009; neither of which tend to evict the minor's heritage; nor in actions pursued by the minor's superior upon feudal casualties or delinquencies, since these are burdens inherent in every feudal grant and consequent upon the *dominium directum*, which remains with the superior. This privilege cannot be pleaded in bar of an action which had been first brought against the father, and is only continued against the minor; nor where the father was not in the peaceable possession of the heritable subject at his death. Before the minor can plead it, he must be served heir to his father; *Fleming v. Curstairs*, Nov. 20, 1683, M. 9070.

26. The persons of pupils are protected from imprisonment on civil debts by 1696, c. 41.(r) The privileges of minors in case of prescription, redemption of adjudications, &c., will be explained in their proper places. Pupils free from caption. (47)

27. Curators are given, not only to minors, but, in general, to every one who, either through defect of judgment, or unfitness of disposition, is incapable of rightly managing his own affairs. Of the first sort are idiots and furious persons. Idiots, or *fatui*, are entirely deprived of the faculty of reason. The distemper of the furious person does not consist in the defect of reason, but in an overheated imagination, which obstructs the application of reason to the purposes of life.(s) Curators may be also granted to Curators of idiots and furious persons. (48)

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(r) But minors past pupillarity may be imprisoned for civil debts; *Thomson v. Kerr*, 1747, M. 8910.

(s) This distinction is less important in the Act which now regulates the cognition of insane persons. The inquiry is now whether the person sought to be cognosed is *insane*, &c.; and he is "deemed insane if he be furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs; 31 & 32 Vict. c. 100, § 101; A. of S., Dec. 3, 1868.

How conferred.

To whom.

His age.

(50, 51)

lunatics, and even to persons dumb and deaf, though they are of sound judgment, where it appears that they cannot exert it in the management of business. Every person who is come of age, and is capable of acting rationally, has a natural right (*t*) to conduct his own affairs. The only regular way, therefore, of appointing this sort of curators, is by a jury summoned upon a brief from the Chancery; which is not, like the brief of common tutory, directed to any judge-ordinary, but to the judge of the special territory where the person alleged to be fatuous or furious resides; (*u*) that if he is truly of sound judgment he may have an opportunity to oppose it; and, for this reason, he ought to be made a party to the brief. (*v*) The care of furious persons belonged anciently to the Sovereign, because he alone had the power of coercing with fetters; Craig, 393, § 9; whereas the care of idiots was committed to the next agnate. By 1585, c. 18, the Roman law, which commits the curatory of both to the agnate, is made ours; but a father is, by the custom of Scotland, preferred to the curatory of his fatuous son, and the husband to that of his fatuous wife, before the agnate. (*w*)

28. Though in the brief of idiocy the inquest is directed to inquire whether the next agnate be of lawful age, (*x*) by which in the general case is meant the age of twenty-one; yet in this question the age of twenty-five seems to be understood, both from 1574, c. 51, which requires that age in tutors of law, without distinction, and from the reference made in 1585, c. 18, to the Roman law, by which none under the age

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(*t*) It has not been decided whether a man can provide for supervening incapacity by making an appointment himself; *Howden v. Sibbald*, March 9, 1833, 11 S. 61; *Paterson v. Pollock*, Dec. 10, 1811, F.C. And a father does not seem to have power to appoint guardians to insane children, except during their minority. See Bell's Prin. 2111; Inst., i. 7, 49.

(*u*) It is now directed to the Lord President of the Court of Session; must be served on the persons sought to be cognosced; and is tried before a judge of the Court of Session and a special jury, in the same way as jury trials in civil causes; 31 & 32 Vict. c. 100, § 101; A. of S., Dec. 3, 1868.

(*v*) See *infra*, § 29, note (*b*).

(*w*) *Halliburton v. Maxwell*, 1719, Fraser, P. & C. 535.

(*x*) This inquiry remains in the brief in 31 & 32 Vict. c. 100.

of twenty-five can be curator to an idiot or furious person. By our old law the inquiry of the inquest was confined to the present state of the fatuous or furious person, and consequently, no verdict of idiotry could be brought as evidence in the reduction of deeds granted by the idiot prior to the date of the verdict; but by 1475, c. 66, a clause is ordained to be inserted in the brief for inquiring how long the fatuous or furious person has been in that condition; and the verdict to be pronounced by the inquest is declared a sufficient ground, without farther evidence, for reducing all deeds granted after the period at which it appeared by the proof that the fatuity or furiosity began.<sup>(y)</sup> But as fatuous and furious persons are by their very state incapable of being obliged, all deeds done by them may be declared void upon proper evidence of their fatuity at the time of signing, though they should never have been cognosced idiots by an inquest; *Loch v. Dick*, July 26, 1638, M. 6278.<sup>(z)</sup>

The verdict has a retrospect.

29. We have some few instances of the Sovereign's giving curators to idiots where the next agnate did not claim; but such gifts are truly deviations from our law, since they pass without an inquiry into the state of the person upon whom the curatory is imposed. Hence the curator of law to an idiot, serving *quandocunque*, is preferred as soon as he offers himself before the curator-dative; *Stewart v. Sprewl*, Jan. 21, 1663, M. 6279.<sup>(a)</sup> This sort of curatory does not determine by the lucid intervals of the person *sub cura*, but it expires by his death or perfect return to a sound judgment; which last ought regularly to be declared by the sentence of a judge.<sup>(b)</sup>

Curatory dative of idiots.

How this curatory expires.

(52)

(y) In the procedure under 31 & 32 Vict. c. 100, and the A. of S., Dec. 3, 1868, there is no provision for such a finding.

(z) On the other hand, the fact that a deed has been executed by a man who is under restraint in an asylum is not conclusive of his incapacity.

(a) Or *Curator bonis*; *Young v. Rose*, July 11, 1839, 1 D. 1242.

(b) Where no application is made for cognition, it has been the practice of the Court of Session, since the abolition of the Scottish Privy Council, to appoint *curatores bonis* to persons incapable of managing their affairs, even although the incapacity is not such as would warrant a verdict of insanity in an inquest; *Irving v. Swan*, Nov. 7, 1868, 7 Macph.

Care of Lunatics.

**Interdiction.**  
(53) 30. Persons, let them be ever so profuse or liable to be imposed upon, if they have the exercise of reason, can effectually oblige themselves till they are fettered by law. Interdiction is a legal restraint laid upon such persons from signing any deed to their own prejudice, without the consent of their curators or interdictors.

**Voluntary interdiction ;**  
(53, 55) 31. There could be no interdiction, either by the Roman law or our ancient practice, without a previous inquiry into the person's condition ; L. 6, *de curat. fur.* (27, 10) ; *Robertson (A v. B)*, Jan. 30, 1618, M. 7158. But as there were few who could bear the shame that attends judicial interdiction, however necessary the restraint might have been to preserve their families, voluntary interdiction has received the countenance of law ; which is generally executed in the form of a bond, whereby the granter obliges himself to do no deed which may affect his estate without the consent of certain friends therein mentioned. Though the reasons inductive of the bond should be but gently touched in the recital, the interdiction stands good ; *Stewart v. Hay*, Nov. 10, 1676,

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86. Such appointments are made on the petition of relatives, and service on the party for whom a curator is asked is always ordered. Such curators have no power over the person of the ward, and they fall by the service of the tutor-at-law. They may be recalled by the Court on proof of the ward's reconvalence ; see *Bryce v. Graham*, May 26, 1826, 2 W. & S. 481 ; Jan. 25, 1828, 6 S. 425 ; July 23, 1828, 3 W. & S. 323. These and most guardians so appointed are now subject to the regulations of the Pupils Protection Act, 12 & 13 Vict. c. 51.

**Lunacy Acts.** When the property of a lunatic is not properly applied for his benefit, and is not under judicial management, the Lunacy Board, or the Accountant of Court, may bring the matter before the Court, which may appoint a judicial factor, or take other necessary measures ; 20 & 21 Vict. c. 71, § 81. By this statute, and 25 & 26 Vict. c. 54, and 29 & 30 Vict. c. 51, the custody and maintenance of lunatics of all classes are now regulated. The Lord Advocate has authority to apply for the detention of dangerous lunatics. Provision is made for the establishment of district asylums, and rules are laid down for obtaining warrants for the removal of the insane and their detention, when necessary, in public or private asylums, or for their maintenance in private families where that is the proper mode of treatment. The statutes also make provision for all pauper lunatics. Every establishment, public or private, is subject to inspection. The whole system is under the supervision of a Board of Lunacy, which is aided by a staff of inspectors.

**M. 7134.** Voluntary interdiction, though it be imposed by how taken off. the sole act of the person interdicted, cannot be recalled at his pleasure; but may be taken off—(1) By a sentence of the Court of Session declaring either that there was, from the beginning, no sufficient ground for the restraint, or that the party is, since the date of the bond, become *rei sue providus*. (2) It falls, even without the authority of the Lords, by the joint act of the person interdicted and his interdictors concurring to take it off. (3) Where the bond of interdiction requires a certain number as a quorum, the restraint ceases if the interdictors shall be by death reduced to a lesser number; *Hepburn v. Hepburn*, Dec. 8, 1708, M. 7154.

**32.** Judicial interdiction is imposed by a sentence of the Court of Session. It commonly proceeds on an action Judicial interdiction; brought by a near kinsman to the party, and sometimes (54) from the *nobile officium* of the Court, when they perceive during the pendency of a suit that any of the litigants is, from the facility of his temper, subject to imposition; *Robertson v. Gray*, Feb. 17, 1681, M. 7134. This sort must be how taken off. taken off by the authority of the same court that imposed it; which authority secures those who shall afterwards contract with him who has been interdicted, even though the strongest evidence should be brought that he still continues profuse or easy to be imposed upon.

**33.** An interdiction need not be served against the person interdicted; but it must be executed or published by a messenger at the market-cross of the jurisdiction where he resides, by publicly reading the interdiction there, after three oyesses made for convoking the lieges. A copy of this execution must be affixed to the cross; and thereafter, the interdiction, with its execution, must be registered in the books, both of the jurisdiction where the person interdicted resides, and where his lands lie, within forty days from the publication; 1581, c. 119, No. 1; 1597, c. 264. Where the sheriff refused registration, the presenter of the interdiction might apply to the clerk-register to have it recorded in the General Register of the Session; 1597, c. 268; but liberty is now given to record all interdictions there, even though the judge of the inferior jurisdiction Publication and registration of interdictions. (56)

At what  
period is inter-  
diction  
effectual.

should not refuse to register them; 1600, c. 13.(c) An interdiction, before it is registered, has no effect against third parties, though they should be in the private knowledge of it; but it operates against the interdictors themselves as soon as it is delivered to them; *Grierson v. Tailzifer*, July 24, 1678, M. 6298.

Interdiction  
secures the  
heritage from  
alienation;

(57)

but not the  
moveable  
estate.

34. An interdiction, duly registered, has this effect, that all deeds done thereafter by the person interdicted, without the consent of his interdictors, affecting his heritable estate, are subject to reduction. Registration in the General Register secures all his lands from alienation, wherever they lie; but where the interdiction is recorded in the register of a particular shire, it covers no lands except those situated in that shire.(d) It appears, both by the old style of interdictions, which continues to this day, and by our practice, that interdictions formerly secured the moveable estates from alienation as well as the heritable, which made all commerce precarious; but since the decision of *Bruce v. Forbes*, July 11, 1634, M. 7130, persons interdicted have had full power to dispose of their moveables, not only by testament, but by present deeds of alienation; and creditors, in personal bonds granted after interdiction, may use all execution against their debtor's personal and moveable estate, such bonds being only subject to reduction in so far as diligence against the heritable estate may proceed against them.

It does not  
strike against  
rational deeds.

(58)

35. All onerous or rational deeds granted by the person interdicted are as effectual,(e) even without the consent of the interdictors, as if the granter had been laid under no restraint; but he cannot alter the succession of his heritable estate by any settlement, let it be ever so rational.(f) No deed, granted with consent of the interdictors, is reduc-

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(c) There is now but one General Register of Inhibitions and Interdictions; 31 & 32 Vict. c. 64, § 16.

(d) See last note.

(e) Even if granted in favour of an interdictor himself, where the other interdictors consent; *Kyle v. Kyle*, Dec. 14, 1826, 5 S. 128; see *Fraser v. Fraser*, Feb. 26, 1827, 5 S. 301.

(f) This appears not to be law, as interdiction does not apply to *mortis causa* deeds; see *Mansfield v. Stuart*, June 26, 1841, 3 D. 1103.

ible, though the strongest lesion or prejudice to the granter should appear. The only remedy competent in such a case is an action by the granter against his interdictors for making up to him what he has lost through their undue consent.(g) It is no part of the duty of interdictors to receive sums or manage any estate; they are given merely *ad auctoritatem præstandam* to interpose their authority to reasonable deeds, and so are accountable for nothing but their fraud or fault in consenting to deeds hurtful to the person under their care.(h) Reduction *ex capite interdictionis* may be brought not only by the heirs of the interdicted person, and by the interdictors, but by the interdicted person himself, though he was not, by our ancient practice, allowed to pursue in his own name a reduction of his own deed, at least without the consent of his interdictors; *Ure v. Mitchelson*, March 14, 1564, M. 7164. Office of interdictors.  
Reduction, to whom competent.  
(59)

36. The law concerning the state of children falls next to be explained; i. 6, § 1. Children are either born in wedlock or out of it. All children born in lawful (i) marriage or wedlock are presumed to be begotten by the person to whom the mother is married, and consequently to be lawful children. This presumption is so strongly founded that it cannot be defeated but by direct evidence that the mother's husband could not be the father of the child, *e.g.*, where he is impotent, or was absent from the wife till within six lunar months of the birth.(j) The canonists, indeed, maintain that the concurring testimony of the husband and wife that the child was Lawful children.  
(i. 6. 49, 50)

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(g) Some doubt has been raised as to this where the lesion is gross, but the point has not been decided; see *Fraser, P. & C.*, 2nd ed., 565.

(h) They seem, like tutors, to be bound to communicate rights acquired by them relating to the interdicted person's estate; *Campbell v. Campbell*, 1761, M. 7156.

(i) *Pater est quem nuptiæ demonstrant* applies only to children conceived during marriage; *Gardner*, May 17, 1877, 4 R. p. 56, aff. J. C. of S. 3 R. 695. The presumption does not apply in favour of one not born *justo tempore*, still less to one born before the marriage of his parents; his paternity must be proved; *Innes v. Innes*, Feb. 20, 1837, 2 S. & M'L. 417; *Smith v. Dick*, Oct. 20, 1869, 8 Macph. 31.

(j) Or for eleven months prior to the birth; see *Stewart v. M'Keand*, 1774, M. 11,664; *Fraser, P. & C.*, 2nd ed., 11 *et seq.*

not procreated by the husband is sufficient to elide this legal presumption for legitimacy; which doctrine is adopted by Craig, 371, § 20, and Lord Stair, ii. 3, § 42: but it is an agreed point, that no regard is to be paid to such testimony, if it be made after they have owned the child to be theirs; (i. 6. 53, 54) Stair, iv. 45, § 20.(k) A father has the absolute right of disposing of his children's persons,(l) of directing their education, and of moderate chastisement; and even after they become *puberes*, he may compel them to live in family with him, and to contribute their labour and industry while they continue there towards his service: which power of compulsion lasts, in Lord Stair's opinion (i. 5, § 13), after their majority. Children, though in family with their father, are capable of receiving sums in gift or legacy, either from strangers or from the father himself, which thereby become their property.(m) A child

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(k) The rules of evidence on this subject are greatly relaxed, and the presumption in favour of legitimacy may be overcome by satisfactory evidence that a husband is not in fact the father of his wife's child; *Mackay v. Mackay*, Feb. 24, 1855, 17 D. 494; *Brodie v. Dyce*, Nov. 29, 1872, 11 Macph. 142. "Questions of legitimacy generally arise with regard to children born so long after the dissolution of the marriage by the death of the husband as to render it unlikely they should be his. Professor More states that no absolute rule has been fixed by our law as to the time within which the child would be considered the legitimate issue of the deceased husband. The ordinary period of gestation is about 280 days, but it seems to be held that children may be born after a gestation of more than 300 days. No declaration by the parents will bastardise a legitimate child; but where there is a doubt, the concurring testimony of father and mother has been held entitled to so much weight as to overbalance a large amount of opposing testimony. This was strikingly exemplified in the great *Douglas* case, of which an excellent summary is given by Professor More, Notes, pp. 80-81."—MOIR. As to the testimony of the parents, see *Beattie v. Baird*, Jan. 16, 1863, 1 Macph. 273; *Brodie v. Dyce*, *cit.*

(l) Subject to the control of the Supreme Court; *Harvey v. Harvey, &c.*, June 15, 1860, 22 D. 1198; *M'Iver v. M'Iver*, July 2, 1859, 21 D. 1103; *Cameron*, July 1, 1847, 9 D. 1401. As to custody in case of divorce, see 24 & 25 Vict. c. 85, § 9; *Steuart v. Steuart*, June 3, 1870, 8 Macph. 821.

(m) The father, however, is always administrator-in-law of his child, "a position inseparable from the relation of parent and child;" but he may be superseded by the judicial appointment of a *curator bonis* if he

who gets a separate stock from the father for carrying on any trade or employment, even though he should continue in the father's house, may be said to be emancipated or forisfamiated, in so far as concerns that stock, for the profits arising from it are his own. Forisfamiation, when taken in this sense, is also inferred by the child's marriage, or by his living in a separate house, with his father's permission or goodwill, Stair, i. 5, § 13. Children, after their full age of twenty-one years, become, according to the general opinion, their own masters; and from that period are bound to the father only by the natural ties of duty, affection, and gratitude. The mutual obligations between parents and children to maintain each other are explained afterwards, iii. 1, § 4 (and note).<sup>(n)</sup>

37. Children born out of wedlock are styled natural Bastards. children or bastards. The state of these persons while they are alive must be tried by the Commissaries; but all actions by the King or his donatary for fixing bastardy on persons deceased, must, like other declaratory actions, be brought before the Session. For the effects of bastardy, see afterwards, iii. 10, §§ 3, 4. Bastards may be legitimated, or made lawful, either—(1) By the subsequent intermarriage of the mother of the child with the father; and this sort of legitimation, though it was not received by our ancient customs (R. M., l. 2, c. 51, § 2; Craig, 366, § 8), does, by our present practice, entitle the child to all the rights of lawful children. The subsequent marriage which produces legitimation is considered by the law to have been entered into when the child legitimated was begotten;<sup>(o)</sup> and hence if he be a male, he excludes, by his right of primogeniture, the sons procreated after the marriage from the succession of the father's heritage, though these sons were lawful children from the birth.

be insolvent, and the child have a separate stock; *Robertsons, p'trs.*, July 12, 1865, 3 Macph. 1077.

<sup>(n)</sup> See also p. 115 as to both lawful children and bastards, where either parents or children are unable to support themselves.

<sup>(o)</sup> This fiction is not now approved. The case of *Kerr v. Martin*, March 6, 1840, 2 D. 752, decided that the marriage of one parent with another party, intervening between the birth of a natural child and the subsequent marriage of its parents, does not prevent its legitimation; but it leaves the rights of issue of the intervening marriage undetermined.

Hence, also, these children can only be legitimated who are begotten of a woman whom the father might at that period have lawfully married. (2) Bastards are legitimated by letters of legitimation from the Sovereign, iii. 10, § 3.

Servants.

(60-62)

38.(p) As to the power of masters over their *servants*. Though servants could not, by our old law, be sold by their masters as their property, yet the condition of these, called *nativi* or bondmen, was in most respects as hard as that of the Roman *servi*; R. M. l. 2, c. 11 *et seq.*; Q. Att. c. 56. But all servants have now for a long time enjoyed the same rights and privileges with other subjects, unless in so far as they are tied down by their engagements of service. (q) Servants are either necessary or voluntary. Necessary are those whom law obliges to work without wages; of whom immediately. Voluntary servants engage without compulsion, either for mere subsistence, or also for wages. Those who earn their bread in this way, if they should stand off from engaging, may be compelled to it by the justices of the peace, who have power to fix the rate of their wages; 1617, 8, § 14; 1661, c. 38.(r)

Colliers and salters.

(61)

39. Colliers, coal-bearers, and salters, and other persons necessary to the collieries and salt-works, as they are particularly described, 1661, c. 56, are, like the *adscriptitii glebæ* of the Roman law, tied down to perpetual service at the works to which they had once entered. Upon a sale of the works the right of their service is transferred to the new proprietor. All persons are prohibited to receive them into their service without a testimonial from their last master; and, if they desert to another work, and are redemanded within a year thereafter, he who has received them is obliged to return them within twenty-four hours, under a penalty; 1606, c. 11. But though the proprietor should neglect to require the deserter within the year, he does not by that short prescription lose his pro-

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(p) As to the law of master and servant, see *infra*, Note B after iii. t. 3.

(q) Even a slave brought from the plantations, acquired his freedom on coming to this country, and could not be sent back to his former condition without his consent; *Knight v. Wedderburn*, 1778, M. 14,545.

(r) Repealed by 53 Geo. III. c. 40.

perty in him, *New Coll.* 117. Colliers, &c., where the colliery to which they are astricted, is either given up, or not sufficient for their maintenance, may lawfully engage with others, *Hope (Coal-heughs)*, March 7, 1616, *E. of Lothian*; but if that work shall be set a-going, the proprietor may reclaim them back to it, F. Feb. 4, 1708, *Wallace*.

40. The poor make the lowest class or order of persons. <sup>The poor. (63)</sup>  
 Indigent children may, by 1617, c. 10, be compelled to serve any of the King's subjects without wages till their age of <sup>Indigent children.</sup> thirty years. Vagrants and sturdy beggars may be also com- <sup>Sturdy beggars.</sup> pelled to serve any manufacturer, by 1663, c. 16. And because few persons were willing to receive them into their service, public workhouses are, by 1672, c. 18, ordained to be built for setting them to work. The poor who cannot work must be maintained by the parishes in which they were born; 1534, c. 22; and where the place of their nativity is not known, that burden falls upon the parishes where they have had their most common resort for the three years immediately preceding their being apprehended, or their applying for the public charity; 1663, c. 16; 1698, c. 21. See *Inveresk v. Tranent*, March 3, 1757, M. 10,571, overruled by *Baxter*, 1767, M. 10,573. Where the contributions collected at the churches to which they belong are not sufficient for their <sup>The poor who cannot work.</sup> maintenance, they are, by 1672, c. 18, to receive badges from the minister and kirk-session, in virtue of which they may ask alms at the dwelling-houses of the inhabitants of the parish.

#### NOTE ON THE LAW RELATING TO THE POOR.

"Scottish legislation on the subject of the poor divides itself into two parts—1st, A series of stringent and severe enactments against vagabonds, now in total desuetude; and 2nd, Provisions for the support of the really destitute poor, which at first consisted merely of the occasional collections at churches, supplemented by a permission to receive voluntary alms; but which gradually resulted in a legal

(c) The Act 15 Geo. III. c. 28, enacted the emancipation of colliers, &c., subject to various conditions which were removed by 39 Geo. III. c. 56.

Parochial  
Board.

Assessments.

assessment imposed on each parish for the support of paupers who had had a continuous residence of a certain period within the parish; or, failing the requisite residence in any particular parish, imposed on the parish of the pauper's birth. The statutes and proclamations of the Privy Council, for all practical purposes, are superseded by the Act of 1845, 8 & 9 Vict. c. 83. 1. Under the new statute, the imposition of the assessment, and the direct regulation of the affairs of the parish, so far as regards pauperism, are committed to a parochial board,—the qualification of its members being the ownership or occupancy of heritage within the parish.<sup>(s)</sup> The assessment is laid on according to the rental, as appearing under the Lands Valuation Act, 17 & 18 Vict. c. 91.<sup>(t)</sup> Each year's assessment should cover each year's necessities; but the principle cannot always be exactly carried out. Thus a person who had recently settled in a parish was not entitled to resist an assessment imposed in 1853 for payment of a debt and for the maintenance of a lunatic, which, under the old board, had been accumulating since 1846; *Archibald v. Macintyre*, Jan. 24, 1856, 18 D. 329. The triennial prescription does not apply to assessments for the poor; *Munro v. Graham*, Nov. 21, 1857, 20 D. 72. The business of the parochial board is—(1) The imposition and collection of an assessment,<sup>(u)</sup> and the administration of the parochial property; (2) the superintendence of the poor's roll, and the determination of applications by paupers for relief. Where applications for relief are altogether

20 & 21 Vict.  
c. 28.

(s) In parishes exclusively burghal, the board consists of a number, fixed by the Board of Supervision, of elected managers duly qualified by ownership or occupancy, four persons nominated by the managers, and four nominated by the kirk-session. In parishes not burghal, it consists of all heritors of the yearly value of £20 and upwards, or their agents or mandataries appointed in writing, the provost and bailies of any royal burgh in the parish, the members of the kirk-session, and a number fixed according to population of members elected by ratepayers not otherwise entitled to act. As to mandates and qualifications, see *Thomson v. Parochial Board of Inveresk*, Nov. 30, 1871, 10 Macph. 178.

(t) 24 & 25 Vict. c. 37; and 30 & 31 Vict. c. 80. Under deduction of the probable annual cost of repairs, insurances, and expenses of maintenance, and rates, taxes, and public charges, 8 & 9 Vict. c. 83, § 37; *Stewart v. Parochial Board of Keith*, Oct. 16, 1869, 8 Macph. 26; *Edinburgh & Glasgow Railway Co. v. Hall*, Jan. 19, 1866, 4 Macph. 301.

(u) Where necessary. In a few parishes the poor are still supported without having recourse to assessment. In such parishes the heritors and kirk-session form the Parochial Board.

refused, an appeal lies to the sheriff, whose decision may be appealed to the Court of Session. Where the application is granted, but not to the extent to which the pauper considers adequate, (v) he may appeal to the Board of Supervision,—a central board constituted by the statute. By § 52, properties or revenues which at the date of the passing of the Act stood vested in the heritors and kirk-session of a parish, or in the magistrates of burghs, under any Act of Parliament, or under any law or usage, or in virtue of gift, grant, bequest, or otherwise, ‘for the use or benefit of the poor of such parish,’ are transferred from the kirk-session or the magistrates to the newly created board. Where the property is held not for the general poor,—i.e., those who are legally entitled to relief, but for particular classes of poor who would not fall within the description of legal poor,—the funds mortified for their relief and their administration remain with the original trustees, and are not transferred to the Parochial Board; and even where the fund has been mortified for behoof of the poor generally, yet the section does not apply where the bequest was made not to the heritors and kirk-session, but to the minister and kirk-session, the heritors being excluded; *Kirk-Session of Bathgate v. Liddell*, July 14, 1856, 14 D. 1075; *Hardie v. The Kirk-Session of Linlithgow*, Nov. 15, 1855, 16 D. 37.” (w)

Property held  
or mortified  
for poor.

“Churches, (x) manses, and glebes of clergymen of the Established Church are exempt from assessment.”

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(v) An offer of relief in a poor-house is a competent and sufficient answer to a pauper's claim; *Watson v. Welch*, Feb. 26, 1853, 15 D. 448; *Forryth v. Nicholl*, Jan. 19, 1867, 5 Macph. 293.

(w) Yet if the feudal title be in the kirk-session alone, while the subjects have been in fact possessed by the heritors and kirk-session jointly for behoof of the legal poor, they fall under this section; *Inspector of Kinglassie v. Kirk-Session*, June 14, 1867, 5 Macph. 1869; *Flockhart v. Kirk-Session of Aberdeen*, Nov. 24, 1869, 8 Macph. 176.

(x) Also places used exclusively for public worship, 28 & 29 Vict. c. 62; and Sunday and Ragged Schools, 32 & 33 Vict. c. 60. Crown property is exempt from assessment for poor's rates, as it is from other assessments; but not, as was formerly supposed, property held as a public trust for the benefit of the whole community; *Adamson v. Clyde Trs.*, Jan. 27, 1860, 22 D. 606; June 26, 1863, 1 Macph. 974, aff. June 22, 1865, 3 Macph. 100; *Miles v. Commrs. of Leith Docks*, June 17, 1864, 2 Macph. 1234, aff. March 12, 1866, 4 Macph. H.L. 14; *Greig v. Univ. of Edinburgh*, July 20, 1865, 3 Macph. 1151, rev. June 8, 1868, 6 Macph. H.L. 97; *Greig v. Heriot's Hospital*, March 28, 1866, 4 Macph. 675.

**Exemptions.**

"An exemption is likewise allowed from assessment by 6 & 7 Vict. c. 36, in favour of societies established exclusively for purposes of science, literature, or the fine arts, in respect of the premises occupied by them for the transaction of their business, either as tenants or owners;(y) but the exemption is thus qualified: 'Provided that such society shall be supplied wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members.'"

**Canals and railways.**

"By § 45 of the Poor Law Act, where any canal or railway passes through more than one parish or combination, the proportion of the annual value on which such assessment shall be made for each such parish or combination shall be according to the number of miles or distance which such canal or railway passes through, or is situated in each parish or combination, in proportion to the whole length; *Edinburgh and Glasgow Railway Co. v. Adamson*, March 10, 1853, 15 D. 537, aff. May 2, 1855, 2 Macq. 331.(z) A railway or canal company is assessable for the railway or canal in the double character of owner and occupant; *Anderson v. The Union Canal Co.*, March 7, 1839, 1 D. 648; *Edinburgh and Glasgow Railway*, *supra*. And a water-company is liable both as owner and occupant of the ground in which the pipes are laid; *Hay v. The Edinburgh Water Co.*, July 13, 1850, 12 D. 1240, H. L., Feb. 13, 1854, 1 Macq. 683."

**Able-bodied poor not entitled to relief.**

"The present statute does not define those who are the poor entitled to relief, but leaves the matter as it stood under the former statutes—the latest of which, the Act 1672, declares that those only shall be entitled to relief 'who are unable to work by reason of age, infirmity, or disease.' An able-bodied person was defined in *Petrie v. Meek* (March 4, 1859, 21 D. 614) to be a person 'under no disability, physical or mental, to work.' For such the benefit of the statute was not intended, even although they might show that no work could be procured; *M<sup>c</sup>William v. Adams*, Feb. 29, 1849, 11 D. 719, aff. H.L., March 26, 1852, 1 Macq. 120. It may now therefore be considered as settled that those only are entitled to relief who are unable to work through mental or bodily infirmity. This incapacity is presumed in the case of poor persons of seventy years of age and upwards, according to the statutes 1424 and 1579, c.

(y) Upon their obtaining a certificate from the Registrar of Friendly Societies.

(z) See Valuation Acts cited in Note (t), p. 112; Deas on Railways, part vii. c. ii. p. 551.

74, and of orphans and destitute children under fourteen, according to the Act 1661, c. 38." (a)

"Who are entitled to the benefit of the Poor Law? No one has a legal right of relief if he has relatives who have the means, and are under a legal obligation to support him. 1st, The persons first liable in the maintenance of an indigent father or mother are his or her descendants, the nearer before the more remote; and the obligation holds equally in the case of maternal and paternal ascendants. 2nd, A father is bound to maintain his children, whether legitimate or illegitimate, and this obligation has been held to extend to a daughter-in-law during her husband's life, if the husband be unable to aliment her; *Duncan v. Hill*, Feb. 17, 1810, F.C. 3rd, The mother is, in like manner, bound to aliment her own children, but this does not extend to a stepmother; *Macdonald v. Macdonald*, June 20, 1846, 8 D. 830. 4th, Sons-in-law are bound, during the subsistence of their marriage, to support their parents-in-law, unless their wives have a separate estate; *Reid v. Moir*, July 30, 1866, 4 Macph. 1060. 5th, In the general case, collaterals, such as brothers and sisters, are not bound to aliment each other, nor an uncle or aunt, a niece or nephew. 6th, But cases have occurred where the eldest son, on succeeding to his father's property, has been held burdened with the maintenance of younger children on the ground of representation, inasmuch as he takes up the father's obligation to maintain his children. 7th, Of course a husband is bound to aliment his wife; but that only in his own house. In all cases where the parties legally bound to furnish aliment to the pauper are in a condition to do so, no burden can be thrown on the public fund. But, assuming that no such relief can be received, it is not necessary that the disability for work of persons otherwise entitled to relief should be total. It is enough that they are in such a condition of disability that they could not earn their subsistence although work should be furnished to them. But such persons, if receiving relief, are bound to contribute as far as they

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(a) In *Jack v. Isdale*, March 31, 1864, 2 Macph. 978, aff. Feb. 12, 1864, 4 Macph. H. L. 1, L. R. 1, Sc. Ap. 1, it was further decided that a parochial board has no power to bestow any part of the funds raised by assessment on able-bodied poor, the right to give and the right to demand relief being correlative; and such persons being expressly excluded from the category of "occasional poor," who are entitled to relief under § 68. But an able-bodied man, with a lunatic member of his family, may be relieved (see p. 120); and an able-bodied widow, burdened with a large family, may obtain relief for them; *Hay v. Dorman*, June 25, 1851, 13 D. 1223.

can towards their own support. They may be set to work by the parish, and the proceeds of their labour either expended on their own maintenance or thrown into the general fund. Mere poverty or inability to work, however, must be combined with some other qualifications in order to give a right of relief from the assessed funds, except in one case—that is to say, where the party is making his claim against *the original parish of his birth*.”

Settlement.

“It is the principle of the law of Scotland—That, as (1) every man must have a birth-settlement, if it can be ascertained; and (2) no man who really falls within the description of a pauper can ever, under any circumstances, be left to starve; a party so circumstanced must, in the absence of any other settlement afterwards acquired, be always entitled to fall back for support on the parish of his birth. This is called an original settlement. But a new settlement may be acquired, and the birth-settlement not lost, but for the time superseded, by the acquisition of another settlement in another parish by residence there. These two settlements, that of birth on the one hand and residence on the other, constitute the only grounds on which the pauper can legally claim relief. These, however, give rise to certain *derivative rights of settlement*, arising from the connection between the pauper himself and his wife or children.”

“In considering the subject of settlement by residence, one thing must be kept in view—That to the pauper himself the matter is one of indifference; if a pauper at all, he must be maintained somewhere; if there be a doubt as to his parish of settlement, he must in the meantime be maintained in that parish where he is compelled to claim relief; so that in all such cases, the contest resolves only into one between different parishes, the one trying to throw on another the burden of the pauper’s maintenance, the other trying to escape it. But as the liability for paupers operates very differently in different parishes, the liability being comparatively slight in remote and thinly-populated districts, while it falls severely on the larger urban districts, it is not surprising to find that the law of settlement has been, on the one hand, most fruitful of contests, and, on the other, from the complicated elements which must enter into the question of the acquisition of residential settlement, its interruption or its loss, that the decisions on the subject are by no means uniform or satisfactory.”

“By § 76 of the Act it is enacted that no one shall acquire a settlement by residence unless he has resided in the parish ‘for five years *continuously*,’ and ‘maintained himself without having

recourse to common begging either by himself or his family, and without having received or applied for parochial relief.' The continuity will not be broken by occasional absences from the parish, even for some weeks at a time; *Kilpatrick*, July 9, 1851, 13 D. 1313; *Hay v. Cuming*, June 6, 1851, 13 D. 1057; *Hamilton v. Kirkwood*, Nov. 13, 1863, 2 Macph. 117. But it was held in *Hutchison v. Fraser*, Feb. 11, 1858, 20 D. 545, that an absence of eleven months by a person who has engaged himself as a servant was sufficient to interrupt the residence; see also *Hay v. Beattie and Hardie*, Dec. 1, 1857, 20 D. 146. These cases sufficiently illustrate the general rule. A short and accidental absence will not affect the continuity of the residence; but anything that distinctly indicates the severance of the connection with the parish will have that effect." (b)

"In regard to the second condition requisite for a settlement, the statute does not inquire how the pauper has been supported in the meantime, whether by the partial contributions of friends or otherwise, provided only there has been no public begging and no actual application for parochial relief; *Hay v. Cuming*, June 6, 1851, 13 D. 1683. Attempts have sometimes been made by ingenious inspectors to get quit of a residential settlement when nearly acquired by obtaining some small donation on the pauper from the parish funds, and then pleading that he had received parochial relief within the five years. In *Porteous v. Blair*, Dec. 16, 1856, 19 D. 181, an advance of this kind was regarded as a mere device, and not a proper case of parochial relief *bonâ fide* made after proper inquiry. See, on the other hand, *Johnston v. Black*, July 13, 1859, 21 D. 1293; *Simpson v. Allan*, July 19, 1859, 21 D. 1363."

"Under the old law, the settlement effected by three years' residence could never be lost except by the acquisition of another settlement. But under § 76 of the existing Act, the residential settlement acquired by the five years' residence is lost 'if during any subsequent period of five years the pauper shall not have resided in such parish or combination for at least one year.' Accordingly, in *Hay v. Morine*, Feb. 7, 1851, 13 D. 628, a party who had acquired an

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(b) The cases of *Greig v. Myles*, July 19, 1867, 5 Macph. 1132, and *Moncrieff v. Ross*, Jan. 5, 1869, 7 Macph. 331, apparently introduce the doctrine that a settlement may be acquired by a constructive as well as by an actual residence—*e.g.*, by the residence of the wife and family of a sailor or fisherman, while he himself is absent during long periods of the five years in the pursuit of his ordinary occupation.

industrial settlement in St. Cuthbert's, but who had during the subsequent five years been absent from St. Cuthbert's for four years and four months, was held to have lost that settlement, as it was impossible for him to show that he had resided continuously for *one year* out of the five."(c)

Derivative  
settlement.

"1. A woman by marriage acquires the settlement of her husband, where that husband has a known settlement; and that settlement continues until she shall have acquired a new settlement by residence or by a second marriage.(d) A settlement acquired by a second marriage was held the ruling settlement, even as to the children of the wife's first marriage, where she was deserted by her husband and became a pauper only in respect of her inability to maintain the children; *Greig v. Adamson and Craig*, March 2, 1865, 3 Macph. 575. But a wife's birth-settlement is only suspended, not extinguished, for in the event of the dissolution of the marriage, and of her having lost her husband's settlement by non-residence, and not having acquired for herself a new settlement by residence, she can fall back on the parish of her birth."

"2. Legitimate children follow the settlement of their father, whether residential or original; *Barbour v. Adamson*, July 2, 1851, 23 D. 603, rev. May 30, 1853, 1 Macq. 376, 25 Jur. 419; illegitimate children that of their mother."(e)

"3. The death(f) of the parent, though prior to the application for relief, does not deprive the child of the benefit of the parent's settlement. On the death of the father, and the failure or loss of the settlement derived from him, pupil children follow the settlement of their mother; *Greig v. Adamson and Craig*, *supra*."

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(c) See also *Crawford v. Petrie*, Jan. 25, 1862, 24 D. 357, where mere absence was held to have this result, although during part of the time after the pauper's removal from the parish of his residential settlement he had been confined in a lunatic asylum, and his absence was therefore involuntary. See also *Kirkwood v. Lennox*, July 10, 1869, 7 Macph. 1027. It was held in *Hay v. Croall*, Feb. 5, 1858, 20 D. 567, that a soldier's residential settlement is not lost by absence with his regiment on duty.

(d) By a second marriage the settlement acquired by the woman's first marriage is not merely suspended, but destroyed, and does not, like her birth-settlement, revive on the death of her second husband; *Kirkwood v. Manson*, March 14, 1871, 9 Macph. 193.

(e) However acquired, *Hay & Thomson v. Murray*, Feb. 6, 1856, 18 D. 510.

(f) Or desertion; *Carmichael v. Adamson*, Feb. 28, 1863, 1 Macph. 453.

"4. The settlement from parentage ceases on the child's acquiring a settlement of his own by residence, or in the case of a daughter, by marriage. See *Cockburnspath*, June 9, 1809, F.C., and *Hay v. Rogers*, Nov. 23, 1852, 15 D. 67. A minor forisfamiliat at the death of his father continues a residential settlement derived from the father; but if his father had only a birth-settlement, is chargeable on the parish of his own birth; *Craig v. Greig and Macdonald*, July 18, 1863, 1 Macph. 1172."

"5. Supposing the parent to have no subsisting residential settlement, the question has been raised, whether the burden of maintaining his pauper child falls on the parish of its own birth or the parish of the father's birth. This question arose in two cases as to children in nonage, unemancipated, and deserted by their father. The Second Division found, following out the case of *Thomson*, July 19, 1850, and others, that the burden of maintaining these children lay on the parish of their own birth, and not on that of the father's birth. But the judgment was reversed in the House of Lords in the case of *Barbour v. Adamson*, 1 Macq. 377."

"Lastly, as to settlement by birth. It is the only settlement which is both inherent and permanent in its character. Settlement by residence is lost by absence: the derivative settlement obtained through a parent or by marriage may be extinguished by foris-familiation and residence elsewhere, or the marriage which connected the husband and wife may be dissolved. But settlement by birth, though suspended during the existence of any other settlement, is never lost, but may always be fallen back upon when every other settlement fails."—MOIR.

The arrangements regarding pauper lunatics are mainly contained in the Lunacy Acts; *supra*, i. 7, § 29, note (b). Pauper lunatics.

The inspector of poor of the parish where a dangerous lunatic is found may apply to the sheriff for his committal to a place of safe custody, and is liable in the expense, with the usual relief against relations or against the parish of the lunatic's settlement at the date of his reception in an asylum. Generally, the expense of obtaining orders of removal of pauper lunatics to asylums, and maintaining them there, also falls on the parish of settlement at the date of reception in a district asylum, or one substituted for it, whether the lunatic was then a pauper or not, and whether supported out of his own means or by a relative bound in relief, and whether the settlement be an original or a derivative one; and the residence in an asylum is by the statute 20 & 21 Vict.

c. 71, § 75, declared to be residence in the parish of settlement. An able-bodied man, with a lunatic wife or child, may obtain relief for them; *Hay v. Paterson*, Jan. 29, 1857, 19 D. 332; and is not rendered a pauper by so doing, or by the confinement of one of his family as a pauper lunatic under the Lunacy Act; *Palmer v. Russell*, Dec. 1, 1871, 10 Macph. 185; *Wallace v. Turnbull*, 10 Macph. 675; neither is a lunatic child, by reason of relief given when living in family with its parent; while so doing it continues *in statu pupillari*, and can neither acquire or lose a settlement; *Milne v. Henderson and Smith*, Dec. 3, 1879, 7 Ret. 317; *Lawson v. Gunn*, Nov. 21, 1876, 4 R. 151; *Kirkwood v. Lennox*, July 10, 1869, 7 Macph. 1027; and residence in an asylum is in law residence in the parish of settlement. Pauper lunatics who are not dangerous and not subject to treatment for cure may be maintained in special wards attached to poor-houses.

#### Removal.

Paupers relieved by a parish not being that of settlement are always liable to be removed, if that can be done with safety. Removal of English and Irish paupers is regulated by a variety of statutes; 8 & 9 Vict. c. 117; 10 & 11 Vict. c. 33; 24 & 25 Vict. c. 76; 25 & 26 Vict. c. 113; 26 & 27 Vict. c. 89.

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 BOOK II.
 

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 TIT. I.—OF THE DIVISION OF RIGHTS, AND THE SEVERAL WAYS  
 BY WHICH A RIGHT MAY BE ACQUIRED.

1. THE things or subjects to which persons have right are the second object of law. The right of enjoying and disposing of a subject at one's pleasure is called property. *Property*, Where a subject belongs in common to two or more different persons, the right is called common property. Proprietors are restrained by law from using their property emulously (g) <sup>how re-</sup> to their neighbour's prejudice: but wherever the lawful act <sup>strained.</sup> of the proprietor tends to his own advantage, though it (2) should prove detrimental to his neighbour, law allows him to use what is his own at pleasure. (h) Every State or Sovereign has a power over private property, called by some lawyers *dominium eminens*, in virtue of which the proprietor may be compelled to sell his property for an adequate price, where an evident utility on the part of the public demands it (i).

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(g) *Ross v. Baird*, Feb. 3, 1829, 7 S. 361.

(h) *Dunlop v. Robertson*, Dec. 1, 1803, Hume 315. For applications and limitations of this principle, see Bell's Pr., § 962 *et seq.*; Guthrie Smith on Reparation, p. 359 *et seq.*; Kames's Pr. of Equity, i. 1. 1; also the various statutes relating to nuisances, 30 & 31 Vict. c. 101, the Smoke Nuisance Act, 20 & 21 Vict. c. 73, and the General Police Act of 1862, 25 & 26 Vict. c. 101.

(i) This principle has received manifold applications in modern times, the most important of which are those which have taken place under the Lands Clauses Consolidation Act of 1845, 8 Vict. c. 19. This Act provides for the fixing of the compensation for land taken under statutory powers, either by private contract, by voluntary reference by both parties to a single arbiter, by jury trial before the sheriff, or by arbitration of two arbiters, one chosen by each party. In estimating the compensation, "regard shall be had not only to the value of the land to be pur-

Things that  
fall not under  
commerce.

(5)

*Res publicæ.*

*Res universi-  
tatis.*

(7)

Things sacred.

(8)

2. Certain things are by nature itself incapable of appropriation, as the air, the light, the ocean, &c.; none of which can be brought under the power of any one person, though their use be common to all. Others are by law exempted from private commerce in respect of the uses to which they are destined. Of this last kind are—(1) The *res publicæ* of the Romans, the property of which was in the State, and their use common to all the members of it, as navigable rivers, highways, bridges, &c. By our feudal system the right of these is vested in the King, chiefly for the benefit of his people, and they are called *regalia* (ii. 6, § 5). (2.) *Res universitatis*, things which belong in property to a particular corporation or society, and whose use is common to every individual in it; but both property and use are subject to the regulations of the society, as town-houses, corporation-halls, market-places, churchyards, (j) &c. The lands, or other revenue belonging to a corporation, do not fall under this class, but are *juris privati*.

3. Of the same nature with the *res universitatis* are things appropriated for the service of God, as churches, church-bells, communion-cups, &c., which by the Roman law were reckoned the property of none; but by ours may be disposed of or sold on proper occasions, and others substituted in their room. Thus, churches may be removed from place to place (i. 5, § 11), and church-bells or communion-cups, when they become unfit for use, may be sold, either by the heritors, or by the kirk-session, with their consent.

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chased, &c., but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise" of the statutory powers (§ 61).

(j) There appears to be a similar *quasi*-property, subject to regulation by heritors, in a lair in a parish burying-ground; *M'Bean v. Young*, Jan. 22, 1859, 21 D. 314. Presbyteries have jurisdiction to extend churchyards or set apart new ones; *Walker v. Presbytery of Arbroath*, March 1, 1876, 3 R. 498. Old burial-grounds may also be closed up, and new ones provided by the Town Council in parishes within burgh, and by the Parochial Board in other parishes, under the Burials' Grounds Scotland Act, 1855, 18 & 19 Vict. c. 68; Duncan's Parochial Law, 6, 15; *Mansfield v. Wright*, 2 Shaw's App. 104.

The right which is sometimes acquired by private persons in the seats of a church, is not, in strict speech, a right of property, but is confined to the special purpose of attending divine service; and may be taken from the acquirer if he removes to another parish, and if the increase of the parishioners, to all of whom the common use of the church belongs, makes a division of the area necessary. Right in the seats of a church.

4. Property may be acquired either by occupation or accession, and transferred by tradition or prescription; but prescription, being also a way of losing property, falls to be explained under a separate title. Occupation, or occupancy, is the appropriating of things which have no owner, by apprehending them, or seizing their possession. This was the original method of acquiring; for in the first state of mankind, before societies were formed, every person, barely by taking into his possession a certain portion of ground, and cultivating it, made the fruits thereof his own; and when he thought fit to abandon it, the next occupier acquired the same right. This continued, under certain restrictions, the doctrine of the Roman law, *quod nullius est fit occupantis*; but it can have no room in the feudal plan, by which the King is looked on as the original proprietor of all the lands within his dominions. Ways of acquiring property. (9) Occupation; it takes no place in immoveable subjects; (11)

5. Even in that sort of moveable goods which are presumed to have once had an owner, a different rule obtains by the law of Scotland, viz., *Quod nullius est fit domini regis*. Thus the right of treasures hid under ground is not acquired by occupation, but accrues to the King; Q. Att. c. 48, § 4, 5; thus, also, where one finds strayed cattle, or other moveables, which have been lost by the former owner (waif goods) the finder acquires no right in them, but must give public notice thereof; and if within year and day after such notice the proprietor does not claim his goods, they become escheat (*ib.*, § 14), and so fall to the King, sheriff, or other person to whom the King has made a grant of such escheats. nor in moveables which have had an owner: (12, 13)

6. In that sort of things which never had an owner—whether animals, as wild beasts, fowls, fishes; or inanimate things, as pearls found on the shore—the original law takes But it obtains in moveables which never had an owner. (10)

place, that he who first apprehends becomes proprietor; insomuch that though the right of hunting, fowling, and fishing be restrained by statute, under certain penalties; 1685, c. 20; 1707, c. 13; 24 Geo. II. c. 34; (k) yet all game, even what is caught in contravention of these Acts, becomes the property of the catcher, unless where the confiscation thereof is made part of the penalty. But whales thrown in or killed on our coasts belong neither to those who kill them nor to the proprietor of the grounds on which they are cast, but to the King; and are therefore called royal fishes. By the *Leges Forestarum*, § 17, according to a copy in the Advocates' Library, all great whales fall as escheat to the King, and also such smaller whales as cannot be drawn by a wain with six oxen. (l)

Royal fishes.

Accession.  
(14)

7. Accession is that way of acquiring property by which, in two things which have a connection with or dependence on one another, the property of the principal thing draws

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(k) The only quadrupeds to which the Game Laws are now applicable are deer, hares, and rabbits; and as to hares, by 11 & 12 Vict. c. 30, it is made lawful for any person, "having at present a right to kill hares in Scotland," to do so himself, or by any person permitted, &c., by any writing under his hand, without the payment "of any assessed taxes or a game certificate," provided that "such hares shall be found or killed in and upon his own land." The game certificate, for which an annual duty is paid, was introduced by 24 Geo. III. c. 43 (1784), extended by 52 Geo. III. c. 93, and other revenue statutes, as 23 & 24 Vict. c. 90, and 33 & 34 Vict. c. 57 (Gun License Act, 1870). Poaching is prohibited by the Day Trespass Act, 2 & 3 Will. IV. c. 68, and the Night Poaching Act, 9 Geo. IV. c. 69. The *close* time is—for grouse, Dec. 10 to Aug. 12; heath-fowl or black game, Dec. 10 to Aug. 20; partridges, Feb. 1 to Sept. 1; pheasants, Feb. 1 to Oct. 1. There is no limitation as to other kinds of game. A landlord's right to game is not a right of property, but a personal privilege incident to ownership, capable of being the subject of lease or donation, and entitling him to prevent any one killing the game, though he is legally on the lands; *Smellie v. Lockhart*, 2 Br. 194. Under the Game Laws Amendment Act, 1877, 40 & 41 Vict. c. 28, an agricultural tenant may, by himself or another, authorised in writing, kill hares; he may also destroy rabbits.

(l) As stated above, this applies only to royal fish cast ashore, which, in fact, are now seldom claimed. When whales are taken at the whale-fishing, the property is, according to the general law of occupancy, in the first pursuer, so long as he continues the pursuit with a reasonable pros-

after it the property of its accessory. Thus, the owner of a mare or cow becomes the owner of the foal or calf; a house belongs to the owner of the ground on which it stands, though built with materials belonging to and at the charge of another; (m) trees taking root in our ground, though planted by another, becomes ours. Thus also, the insensible addition made to one's ground by what a river washes from other grounds, which is called *alluvio*, accrues to the master of the *Alluvio*. ground which receives the addition; § 10, 20 *Inst. de rer. div.* (2, 1). The Romans exempted from this rule the case of paintings drawn on another man's board or canvas, in consideration of the excellency of the art (*ib.* § 34); which exception our practice has, for a like reason, extended to what is written on another man's paper or parchment. (n) Paintings fall not under accession, (15) nor writings.

8. Under accession is comprehended specifications, by which is meant a person's making a new species or subject from materials belonging to another. Where the new species can be again reduced to the matter of which it was made, law considers the former mass as still existing; and therefore the new species, as an accessory to the former subject, belongs to the proprietor of that subject; but where the thing made cannot be so reduced, as in the case of wine, which cannot be again turned into grapes, there is no place for this *fiction juris*; and therefore the workmanship draws Specification. (16)

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pect of success, and not in any one subsequently interfering or assisting in the capture; *Sutter v. Aberdeen Arctic Co.*, Feb. 8, 1861, 23 D. 465, rev. April 3, 1862, 4 Macq. 355. But this rule is subject to modification and alteration by the usages of different fishing-stations; *ibid.*; *Addison v. Row*, March 3, 1794, 3 Pat. 334; Bell's Pr. 1289.

(m) But the owner of the ground is bound to pay the value of the buildings, so far as he has been benefited by them; *Inst. iii*, l. 11; *Clark v. Brodie*, and *Mackay v. Brodie*, Nov. 28, 1801, Hume 548, 549. This rule applies only to buildings erected by a *bonâ fide* possessor; *Barbour v. Halliday*, July 3, 1840, 2 D. 1279. Sometimes what has been built is allowed by the Court to remain on equitable conditions, although the owner of the soil wishes it to be removed; *Jack v. Begg*, Oct. 26, 1875, 3 R. 35.

(n) In these cases, of course, the price or value of the canvas or paper must be paid to its former owner.

after it the property of the material; § 25, *Inst. de rer. div.* (2, 1).<sup>(o)</sup>

Commixtion,  
(17)

made by consent of the proprietors;

made without their consent.

9. Though the new species should be produced from the commixtion or confusion of different substances belonging to different proprietors, the same rule holds; L. 5, § 1, *de rei vind.* (6, 1); but where the mixture is made by the common consent of the owners, such consent makes the whole a common property, according to the shares that each proprietor had formerly in the several subjects. Where things of the same sort are mixed without the consent of the proprietors, which cannot again be separated, *e.g.*, two hogsheads of wine, the whole likewise becomes a common property; but, in the after division, regard ought to be had to the different qualities of the wines. If the things so mixed admit of a separation, *e.g.*, two flocks of sheep, the property continues distinct. This last rule was, with too great subtlety, extended by the Roman law to the casual commixtion of all solids, even where a separation was really impracticable, *e.g.*, to the mixture of two parcels of wheat, because each grain or particle retained its own form, notwithstanding the commixtion; § 28, *Inst. de rer. div.* (2, 1).

Tradition,  
(18)

10. Property is carried from one to another by tradition, which is the delivery of possession by the proprietor, with an intention to transfer the property to the receiver. Two things are therefore requisite in order to the transmitting of property in this way—(1) the intention or consent of the former owner to transfer it on some proper title of alienation, as sale, exchange, gift, &c.; (2) the actual delivery, in pursuance of that intention. The first is called the *causa*, the other the *modus, transferendi dominii*, which last is so necessary to the acquiring of property that he who gets the last right with the first tradition is preferred, according to the rule *Traditionibus, non nudis pactis, transferuntur rerum dominia* (l. 20, *C. de pact.*, 2, 14).

either real or symbolical.

(19)

11. Tradition is either real, where the *ipsa corpora* of

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(o) The owner and workman in each case have claims for recompense or indemnity; Bell's Pr. 1298. See on this subject Bell's Com. i. 278; *Wylie v. Lochead*, Feb. 17, 1870, 8 Macph. 552.

moveables are put into the hands of the receiver; or symbolical, which is used where the thing is incapable of real delivery, *e.g.*, in immoveable subjects, as lands, mills, houses; or in subjects which consist *in jure* (things incorporeal), as rights of jurisdiction, patronage, fishing, &c.; in all which certain symbols are delivered to the receiver to stand in place of the delivery of the possession. The property of certain moveables, though they are capable of real delivery, may be transferred by symbolical. Thus if the subject be under lock and key, the delivery of the key (*p*) is considered as a legal tradition of all that is contained in the repository. In one particular case property is transferred without any tradition, either real or symbolical—viz., where the possession or custody of the subject has been before with him to whom the property is to be transferred; for which this plain reason may be given without the necessity of recurring to a fiction of law, that in such case there is no room for tradition.

12. Possession, which is essential both to the acquisition Possession,  
and enjoyment of property, is defined the detention of a thing (20, 21)  
with a design or *animus* in the detainer of holding it as his  
own. It cannot be acquired by the sole act of the mind with- how acquired;  
out real detention; but being once acquired it may be con-  
tinued *solo animo*. Possession is either natural or civil. how con-  
*Natural* possession is when one possesses by himself; thus, tinued. (22)  
we possess lands by cultivating them and reaping their fruit; Natural  
houses, by inhabiting them; moveables, by detaining them possession.  
in our hands. *Civil* possession is our holding the thing Civil  
either by the sole act of the mind, or by the hands of another possession.  
who holds it in our name; thus, the owner of a thing lent  
possesses it by the borrower; the proprietor of lands by his  
tacksman, trustee, or steward; the pupil by his tutor, &c.  
The same subject cannot be possessed entirely or *in solidum*

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(*p*) This, perhaps, is a real rather than a symbolical delivery, the subject being put in the power of the person to whom the property in it is to be transferred. See Bell's Com. i. 175; *Maxwell v. Stevenson*, 8 S. 618, rev. April 4, 1831, 5 W. and S. 269. Many questions arise where the subject is not in the natural but the civil possession of the transferrer or seller, *i.e.*, where a third party holds for him. As to such cases, see *infra*, Note A at end of B. iii. t. iii.

by two different persons at one and the same time; and therefore possession by an act of the mind ceases as soon as the natural possession is so taken up by another that the former possessor is not suffered to re-enter. Yet two persons may, in the judgment of law, possess the same subject at the same time, on different rights. Thus, in the case of a pledge, the creditor possesses it in his own name, in virtue of the right of impignoration, while the proprietor is considered as possessing in and through the creditor, in so far as is necessary for supporting his right of property. The same doctrine holds in liferenters, tacksmen, and generally in every case where there are rights affecting a subject distinct from the property.

*Bona fide*  
possession of  
the fruits,

(25, 26)

secures the  
possessor, in as  
far as he has  
either con-  
sumed or  
uplifted.

13. A *bona fide* possessor is he who, though he is not really proprietor of the subject, yet believes himself proprietor on probable grounds. A *mala fide* possessor knows, or is presumed to know, that what he possessed is the property of another. A possessor *bona fide* acquired right by the Roman law to the fruits of the subject possessed, that had been reaped and consumed by himself, while he believed the subject his own; § 35, *Inst. de rer. div.* (2, 1). By our customs perception alone without consumption secures the possessor; nay, if he has sown the ground while his *bona fides* continued, he is entitled to reap the crop, *propter curam et culturam*. But this doctrine does not, according to Bankt. i. 214, § 19, reach to civil fruits—*e.g.*, the interest of money, which the *bona fide* receiver must restore, together with the principal, to the owner.(q)

When *bona*  
*fides* ceaseth.

(28)

14. *Bona fides* necessarily ceaseth by the *conscientia rei alienae* in the possessor, whether such consciousness should proceed from legal interpellation or private knowledge; for the essence of *bona fides* consists in the possessor's opinion that the subject is his own; L. 20, § 11, *de her. pet.* (5, 3); *Children of Woolmet v. Douglas*, Nov. 20, 1662, M. 1730. The decision, *Westraw v. Williamstown*, March 14, 1626, M. 859, brought by Viscount Stair in support of the contrary

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(q) In the *Inst.*, l. c., the author gives it as his opinion that the *bona fide* possessor is entitled to interest.

opinion, proves no more than that an assignation without intimation is an incomplete deed. *Mala fides* is sometimes induced by the true owner's bringing his action against the possessor, by which the lameness of his title may appear to him; sometimes not till litiscontestation, which was the general rule of the Roman law; and, in cases uncommonly favourable, it is not induced till sentence be pronounced against the possessor.(r)

15. The property of moveable subjects is presumed by the bare effect of possession until the contrary be proved; but possession of an immoveable subject, though for a century of years together, if there is no seisin, does not create even a presumptive right to it; *nulla sasina, nulla terra*. Such subject is considered as a caduciary, and so accrues to the Sovereign.(s) Where the property of a subject is contested, the lawful possessor is entitled to continue his possession till the point of right be discussed; and if he has lost it by force or stealth, the judge will, upon summary application, immediately restore it to him.(t)

16. Where a possessor has several rights in his person affecting the subject possessed, the general rule is that he may ascribe his possession to which of them he pleases. But (1.) one cannot ascribe his possession to a title other than that on which it commenced, in prejudice of him from whom his title flowed; Stair, ii. 1, § 27.(u) (2.) If, in a competition, a

Effects of possession of moveables;

(11)

of immoveables.

Privileges of possession.

(24)

To what title possession ought to be ascribed.

(30)

(r) Where there is no reason to suppose that litigation is carried on in bad faith, the tendency of the Courts now is to assume the continuance of good faith, with its consequence, until the final decision in the cause, even if that should be in the House of Lords. See *Moir v. Mudie*, June 16, 1826, 4 S. (2nd ed.) 731; *Cleghorn v. Elliot*, June 10, 1842, 4 D. 1389; *Carnegy v. Scott*, Dec. 4, 1826, 6 S. 206, aff. Dec. 9, 1830, 4 W. and S. 431; *Menzies v. Menzies*, July 3, 1863, 1 Macph. 1025. But in some circumstances the presumption of good faith may cease as soon as the claim is made; *Clyne v. Clyne's Trs.*, Dec. 14, 1839, 2 D. 243.

(s) This refers to subjects which have been feudalised, and where seisin is necessary to complete the right; but in regard to allodial or udal rights, or other heritable rights which require no seisin, possession has the same effect as it has in moveables.

(t) *Infra*, iv. 1. 23, 25.

(u) See *King v. Wieland*, May 25, 1858, 20 D. 960.

possessor shall be forced to depart from a title as lame, by which he had defended himself, he cannot thereafter ascribe his intromission, in prejudice of his competitor, either to that title from which he was beat, or to any other equally insufficient. (3.) He who has a sovereign right in his person to a subject will not be allowed to ascribe his possession to any other right which he may have acquired as accessory to the first; *Lord Al. Hay v. Spot's Crs.*, July 7, 1708, M. 9230.

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TIT. II.—OF HERITABLE AND MOVEABLE RIGHTS.

- (1-3)      1. For the better understanding the doctrine of this title, it must be known that, though by the Roman law the person or persons next of blood in one dying intestate succeeded to the right of his whole estate, of whatsoever subjects it might have consisted, yet, by the law of Scotland, and indeed of most nations of Europe, since the introduction of feus, wherever there are two or more in the same degree of consanguinity to the deceased, who are not all females, such rights as are either properly feudal, or have any resemblance to feudal rights, descend by law wholly to one of them, who is considered as the proper heir of the deceased; the others, who have the name of next of kin or executors, must be contented with that portion of the estate which is of a more perishable nature. Hence has arisen the division of rights to be explained under this title; the subjects descending to the heir are styled heritable, and those that fall to the next of kin, moveable.
- (4, 7)      2. All rights of, or affecting, lands—under which are comprehended houses, mills, fishings, teinds (v)—and all rights

Rights are  
either herit-  
able or move-  
able.

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(v) Questions of difficulty arise with regard to machinery. In *Fisher v. Dixon*, March 7, 1843, 5 D. 775 H. L., June 26, 1845, 4 Bell 285, it was held that machinery fixed in any way to the soil for the use of mines worked by the landowner, and which could not, without being so fixed, be used for the profitable enjoyment of the land, was heritable as between

of subjects that are *fundo annexa*, whether completed by seisin or not, are heritable *ex eud natura*. On the other part, everything that moves itself, or can be moved, and, in general, whatever is not united to land is moveable, as household furniture, corns, (w) cattle, cash, arrears of rent and of interest, even though they should be due on a right of annualrent; for though the arrears last mentioned are secured on land, yet being presently payable, they are considered as cash. It has been doubted whether bygone feu-duties fall under

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heir and executor. In such a case, erections attached to the land for its profitable enjoyment cannot be carried away by the executor, leaving the bare land to the heir. Nor is it necessary, according to this judgment, that the articles shall be indissolubly fixed to the soil; it is enough that they are so fixed as to show that they were meant to be connected with and serve the uses of the property. Accession is often as strong a bond of connection as physical annexation. In cases between landlord and tenant the rule recognised in England would probably be applied—viz., “That things which a tenant has fixed to the freehold for the purposes of trade or manufacture may be taken away by him wherever the removal is not contrary to any prevailing practice; where the articles can be removed without causing material injury to the estate, and where of themselves they were of a perfect chattel nature (i.e., moveable nature) before they were put up, or at least have that character independently of their union with the soil, or, in other words, where they may be removed without being entirely demolished, or losing their essential character and value. If an erection put up in relation to trade can be severed without violating any one of these conditions, it may be very safely affirmed, that whatever be its magnitude, construction, or mode of annexation, it is a fixture which a tenant is privileged to remove;” *Amos and Ferrand on Fixtures*, 48. This rule was implicitly adopted in one branch of *Fisher v. Dixon*, *cit.* But although this be the rule in a question between landlord and tenant, if the question be between the tenant's heir and his executor, it has been held that machinery erected for the fuller enjoyment of the subject of the lease goes to the heir along with the lease itself. *Brand's Tra.*, Dec. 19, 1874, 2 Ret. 258, rev. H. L., Mar. 16, 1876, 3 Ret. 19.

(w) Industrial crops are moveable even when uncut. In a question between liferenter and fiar, the hay or second year's grass raised from grass seeds sown with the last crop of corn, was held to be heritable; *M. Tweeddale v. Somner*, Nov. 19, 1816, F.C. But as between landlord and tenant, it seems that now the hay will be held moveable and to belong to the tenant; *Keith v. Logic*, Dec. 3, 1825, F.C., and 4 S. 272; *Lyll v. Cooper*, Nov. 27, 1833, 11 S. 96.

Bygone feu-  
duties are  
moveable.

(6)

Rights bearing  
a tract of  
future time are  
heritable.

this rule; and on the supposition that they did not, as being inseparable from the right of superiority itself, it was adjudged (*Wilson v. Bell and Grant*, 1718, M. 5455) that the vassal's heir was the proper debtor in the feu-duties due by the vassal before his death. But it was since decided (*Martin v. Agnew*, June 25, 1755, M. 5457) that bygone feu-duties, like other arrears, are moveable, and consequently belong to the superior's executors. In rights bearing a tract of future time—i.e., rights which cannot be fulfilled at once, and which carry a yearly profit to the creditor while they subsist—e.g., an annuity for a certain term of years, though the arrears due before the creditor's death are moveable, yet the rights themselves are heritable, both because they yield an annual profit, and because nothing falls under executry but what is instantly payable, and can be gathered in and distributed among those that have interest in it; *Ewing v. Drummond*, 1752, M. 5476. So that, admitting them not to be heritable *ex sua natura*, the heir is the only person who can take them. Leases of land are heritable, both as they have a tract of future time, and as statute has given to them, in certain respects, the effect of real rights of land (ii. 6, § 9).<sup>(x)</sup>

3. Debts (*nomina debitorum*), when due by bill, promissory-note, or account, are moveable. When constituted by bond they do not all fall under any one head, but are divided into heritable and moveable by the following rules:—The taking of interest being forbidden by the canon law, persons who could make no profit of their money but by putting it out at interest were, before the Reformation, laid under the necessity of purchasing rights on land constituted by

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(x) "It has not yet been determined whether patents and copyrights are heritable or moveable. More (Notes, 141) is of opinion that they are heritable, as having a tract of future time. Bell does not express his own opinion, but refers to More. But although the decisions in Exchequer as to liability for legacy-duties are not conclusive, turning as they often do on peculiarities of expression in Revenue Statutes, I infer from *Advocate-General v. Oswald*, May 20, 1848, 10 D. 969, that patents will be held moveable not only with regard to succession-duty, but as to the right of succession itself."—MORR. It seems to be now settled that they are moveable; *Hill v. Hill*, Dec. 21, 1872, 11 Macph. 247.

infestment; by which the lands contained in the right were burdened with the yearly payment of a certain sum to the receiver, redeemable by the proprietor on repayment of the purchase-money. As these were bargains affecting land, they were understood to be heritable. Even after the Reformation till towards the end of the last century the form of these rights suffered but little variation: during that period the debtor, in consideration of a certain sum lent, became bound to infest the creditor in a correspondent annualrent forth of his lands, and obliged himself personally to the payment thereof; but he came under no obligation for the principal sum, except in the special case that the creditor should choose to make requisition of his money rather than retain the heritable right. But now these rights are changed into proper bonds, by the first part of which the debtor is personally bound to repay the principal sum and interest; and, for the creditor's further security, obliges himself to infest him in the annualrent. All debts constituted by either of these forms are heritable, for they not only carry a yearly profit but are secured upon land.<sup>(y)</sup>

Rights of  
annualrent,

and bonds  
bearing in-  
festment,

are heritable.

4. Bonds merely personal, though bearing a clause of interest, have been always moveable before the term of payment, because it is presumed that the creditor is at that term to turn his bond into cash; *Douglas v. M'Michael*, Feb. 26, 1629, M. 5504: (z) but such bonds after the term of payment were by our old law considered as *feuda pecuniæ*, and consequently heritable; for which this reason is generally given, that by the creditor's not calling then for his money, his intention was presumed to let it lie for some time at a yearly profit; and where the first term of payment of the interest was made prior to the term of payment of the principal sum, the bond became heritable from the period that the interest first fell due, because the creditor was thereby presently entitled to yearly profits on his bond; *Ramsay v. Ramsay*,

Personal bonds  
formerly herit-  
able after the  
term of  
payment:

(9)

(y) See *infra*, § 8, note.

(z) Even if the term of payment is postponed to a very distant day, provided there be no contingency or previous payment of interest; see *Gray v. Walker*, March 11, 1859, 21 D. 709; but this decision is adverse to the doctrine of the author in the Inst. l. c., and the cases there cited.

1682, M. 4234.(a) Debts which carried interest, not from the force of any clause in the obligation, but *ex lege*, as bills, claims of relief, &c., were moveable; because in these it was not the creditor who created the interest but the law itself, which considered not so much the raising a yearly profit on the subject as the equity of the case; *Cant v. Edgar*, July 10, 1628, M. 5564.

They are now  
moveable as to  
succession;

(10)

but continue  
heritable as to  
the fisk and  
relict.

5. For enlarging the fund for the provision of younger children, all sums contained in contracts and obligations having clauses of interest are declared to belong in time coming not to the heir but to the next of kin or executors, by 1661, c. 32 (copied after 1641, c. 57), and so are made moveable in regard to succession. But the statute provides that they shall still continue heritable with respect to the fisk, and to the rights of husband and wife; that is, though by the general rule moveable rights fall under the communion of goods consequent upon marriage (i. 6, § 7), and the moveables of denounced persons fall to the Crown or fisk by single escheat (ii. 5, § 27), yet bonds bearing interest do neither, but are heritable in both respects.

What bonds  
are still  
heritable.

(12)

Bonds seclud-  
ing executors.

6. By this statute bonds bearing an obligation to infest,(b) and bonds taken payable to heirs and assignees secluding executors, continue heritable in all respects; the first from the proper nature of the right, and the other from the destination of the creditor. A bond secluding executors, when it is carried from the original creditor to his heir by service, continues heritable; *Mackay v. Robertson*, Jan. 12, 1725, M. 3224. Where the creditor assigns such bond to his eldest son and his heir, though without any express seclusion of executors, it also continues heritable in the person of the eldest son; *Kennedy v. Kennedy*, 1747, M. 5501; but if it were so assigned to a stranger and his heirs, it would probably go to the assignee's executors; since the exception in the statute arises not from the heritable nature of the debt (bonds secluding executors being in their nature as really moveable as others), but from the destination of the creditor,

(a) *Downie v. Downie's Trs.*, July 14, 1866, 4 Macph. 1067.

(b) This is no longer so. See § 8, note (f).

which cannot be interpreted to regulate the succession of an assignee over whom the creditor has no power.(c)

7. The right of a bond which is made payable to heirs, without mention of executors, descends not to the proper heir in heritage, though heirs are mentioned in the bond, but to the executors; for the word heir, which is a generic term, points out him who is to succeed by law in the right; and the executor, being the heir *in mobilibus*, is considered as the person to whom such bond is taken payable. But where a bond is taken to heirs-male, or to a series of heirs one after another, such bond is heritable, because its destination necessarily excludes executors. This statute has made no alteration in the condition of rights that were formerly moveable; and, therefore, such bonds or other debts as were moveable by the old law continue moveable to this day in all respects, even *quoad fiscum et relictam*; *Lesly v. Nicolson*, Dec. 18, 1724, M. 5768; *Meuse v. Craig's Exrs.*, 1748, M. 5506. (11) Bond taken to heirs.  
(13) Bond taken to heirs-male.  
(14)

8. Subjects originally moveable become heritable:—(1.) By the proprietor's destination. Thus a jewel or any other moveable subject may be provided to the heir.(d) And the destination, if it be properly expressed, has this effect though it should not be carried into execution. Hence, a sum destined by a marriage-contract to be settled on heirs is heritable, though no settlement should be made in pursuance of the destination; *Robertson v. Seton*, Jan. 19, 1637, M. 5489. This arises from the right competent to every proprietor to settle his property on whom he pleases.(e) (2.) Moveable rights may become heritable by the supervening of a herit-

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(c) The majority of the Court in *Ross v. Ross*, July 4, 1809, F.C., held such bonds to be heritable *sud natura*. Professor Montgomerie Bell (*Lectures*, 240) remarks that the point cannot be held as finally settled. See § 8, note (f).

(d) *Veitch v. Young*, 1808, M. App. "Service," 4; *Baillie v. Grant*, May 21, 1859, 21 D. 838.

(e) Upon this principle, window-frames, doors, and the like, found within a house when building, although not yet fixed to their proper places, belong to the heir; *Johnston v. Dobie*, Feb. 25, 1783, M. 5543; *Hailes* 919. "Where heritable subjects have been vested in trustees with a direction to convey them *in forma specificâ* to certain beneficiaries, and a corresponding right in them to demand a conveyance, the *jus*

able security.(f) Thus, a sum due by a personal bond becomes heritable by the creditors accepting an heritable right for securing it, or by adjudging upon it.(g) In these instances destination is not considered; for creditors, when they take heritable rights or deduce adjudications on their debts, are presumed to do it to secure their payment, and not to alter the order of succession: and, for that reason, in the case of an adjudication, the debt does not change its nature from the date of the summons of adjudication, by which the

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*crediti* thence arising is heritable; *Durie v. Coutts*, Nov. 20, 1791, M. 4824. But where the conveyance to the trustees is one of a mixed estate, and the right of the beneficiary resolves into a right of demanding payment of his share of the residue, the right is moveable and descends to executors; *Grierson v. Ramsay*, Feb. 25, 1780, M. 759; *Burrell v. Burrell*, Dec. 14, 1825, 4 S. 314. But it is sometimes a difficult question whether the beneficiary's right is a right to claim an heritable subject, or merely a share of the general residue. Where the trust contains an express direction to sell and divide the proceeds, it is moveable. But where there is merely a discretionary power to sell, it may depend on the necessity for exercising that discretion whether the resulting interest of the beneficiary is heritable or moveable. It must appear, as Lord Westbury observed, that the exercise of the power is indispensable to the execution of the trust, *Buchanan v. Angus*, 22 D. 979, H. L. May 15, 1862, 4 Macq. 374; *Cathcart v. Cathcart*, May 26, 1830, 8 S. 803; *Spiers v. Spiers*, Nov. 21, 1850, 13 D. 81."—MOIR. Where lands were taken by a railway company under statutory powers, and the proprietor died before receiving payment of the price fixed by arbitration and deposited, it was held that the transaction was not a proper sale, and the sum fixed was to be regarded not as a price but as compensation, and so was moveable, and went to the executor; *Heron v. Espie*, June 6, 1856, 18 D. 917; see *Moncrieff v. Miln*, July 16, 1856, 18 D. 1286. The character thus impressed on subjects by destination does not affect the character of the diligence by which creditors may attach it.

(f) Heritable securities are declared, by 31 & 32 Vict. c. 101, § 117, to be moveable with regard to the succession of the creditor, unless executors are expressly excluded. This may be done by the creditor either in the original security, in an assignation thereof, or by a minute recorded in the same register as the security. But such securities remain heritable as to the debtor and as regards the rights of spouses and the fisk, and are not to be held as part of the creditor's moveable estate in computing legitim.

(g) But an adjudication led by a factor *loco tutoris* has no such effect; *Ross v. Ross's Trs.*, 1793, M. 5545; *Lady C. Graham v. Hopetoun*, 1798, M. 5599.

creditor shows his intention to adjudge; but from the date of the decree by which the debt is made a real burden on the lands; *Carnegy v. Carnegy*, Jan. 16, 1700, M. 5537. Trust-rights of heritable subjects granted by a debtor to his personal creditors and accepted or acceded to by them make their debts heritable; but as soon as the subject of the trust is sold, the debts return to their former moveable nature.<sup>(h)</sup> (15)

9. Heritable rights do not become moveable by accessory moveable securities; *Wishart v. Ballantynes*, 1683, M. 5552; the heritable right being in such case the *jus nobilius*, which draws the other after it. By our former law, requisition by a creditor in a right of annualrent made the sum in the right moveable, which before was heritable. This seems to have proceeded not so much from the indication thereby given of the creditor's purpose to have his money, as from the old style of heritable bonds bearing requisition, by which the creditor's requisition and the subsistence of the real right of annualrent were made incompatible (*supra*, § 3); so that, the real right being dissolved, the sum could remain no longer heritable. In other cases, therefore, where no such specialty occurs, the creditor, though he should discover an intention to have his money, does not thereby alter the nature of the debt: thus, though the obtaining of a decree implies in it a demand of the debt by the creditor, it does not make an heritable sum moveable; *Scot v. Buccleuch*, Feb. 27, 1712, M. 3362: thus also, though a charge given upon letters of horning by a creditor is the strongest indication of his purpose Heritable rights do not become moveable, (16)

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(h) "Where the debtor conveys his lands to his creditors by name for security and payment of their debts, and the creditors are with their own consent infeft, the debts become heritable, and so continue while the conveyance remains in force. The same effect is produced where the land is conveyed to a trustee for behoof of creditors specially named, and where the trustee is infeft, and the creditors have acceded to the trust. But where the trust is merely for the purpose of selling and paying the debts, the creditors have no real right, and the condition of the debts remains unaltered;" Bell's Com. ii. 5; *Hawkins v. Hawkins*, May 23, 1843, 5 D. 1035, where it is said that the criterion is whether the creditors have a mere *jus crediti*, entitling them to call the trustee to account, or a specific real right.—See Ivory's note, Inst. l. c. See also note (f) above.

or even by  
charging for  
the debt.

to recover payment, yet by our latest decisions, neither a charge on a bond made heritable by adjudication (*Reids v. Campbell*, Nov. 12, 1726, M. 5585), nor on a bond secluding executors (*Gray v. Panton*, July 24, 1705, M. 5581), has the effect to make the sum moveable; *Douglas v. Dickson*, 1751, M. 5576, 5 B. S. 793. In the same manner, a bond not falling under the *jus mariti* continues, in the opinion of Mackenzie (h. t., § 7), heritable, so as to exclude the husband notwithstanding a charge given on it by the wife.

Price of lands  
when herit-  
able, when  
moveable.

(17)

10. Where lands are voluntarily sold, either by a formal disposition or even by a minute of sale, the price, if it be not heritably secured,<sup>(i)</sup> must as a moveable subject go to the seller's executors; *Chiesly v. Chiesly*, Dec. 22, 1704, M. 5531. But in judicial sales for the behoof of creditors, the debts continue heritably secured on the price till payment or the conveyance to the purchaser; and therefore, in so far as they are not paid to the creditor himself, they must go to his heir.

Rights partly  
heritable,  
partly move-  
able.

(19)

Heritable  
bonds before  
seisin.

11. Certain subjects partake, in different respects, of the nature both of heritable and moveable. Personal(<sup>j</sup>) bonds are now moveable in respect of succession, but heritable as to the fisk and husband and wife. All bonds, whether merely personal or even heritable, on which no seisin has followed, may be affected at the suit of creditors, either by adjudication, which is a diligence proper to heritage; or by arrestment, which is peculiar to moveables; 1661, c. 51.

Bonds seclud-  
ing executors.

Bonds secluding executors, though they descend to the creditor's heir, are payable by the debtor's executors without relief against the heir; since the debtor's succession cannot be affected by the destination of the creditor; and, on the same ground, an obligation to employ a sum due by a moveable bond, in favour of the heir of a marriage, is heritable as to the creditor, because of the destination; but it continues moveable as to the debtor; *Nasmith v. Jaffray*, July 25, 1662, M. 5483. A bond taken to a creditor, and, failing him, to a substitute, is, in the opinion of some lawyers (*Stewart*, Ans. *voce Substitutes*), in so far moveable, that the creditor can bequeath it by testament; and yet it descends

(i) See p. 134, note (f).

(j) As also heritable bonds; see above § 8, note (f).

not to executors: and the method of completing titles to it by the substitute after the creditor's death, is by service as heir of provision, which is a method of transmission proper to heritage. But it is a rule more agreeable to the analogy of our law, that nothing which goes to the heir by service can be carried off to his prejudice, either by deed on death-bed, or by testament.(k)

12. All questions whether a right be heritable or moveable, must be determined according to the condition of the subject at the time of the ancestor's death. If it was heritable at that period, it must belong to the heir; if moveable, it must fall to the executor, without regard to any alterations that may have affected the subject, in the intermediate period between the ancestor's death and the competition.(l)

What period makes a subject heritable or moveable.

(20)

### TTT. III.—OF THE CONSTITUTION OF HERITABLE RIGHTS BY CHARTER AND SEISIN.

1. Heritable rights are governed by the feudal law, which owed its origin, or at least its first improvements, to the Longobards; whose kings, upon having penetrated into Italy, the better to preserve their conquests, found it their interest to make grants to their principal commanders of great part of the conquered provinces, to be again subdivided by them among the lower officers, under the conditions of fidelity and military service.

Origin of the feudal law.

(3)

2. The feudal constitutions and usages were first reduced into writing, about the year 1150, by two lawyers of Milan, under the title of *Consuetudines Feudorum*, and have been subjoined to Justinian's Novels in almost all the editions of

*Consuetudines feudorum*

(5, 6)

(k) All heritable subjects may now be conveyed by testament, see § 8, note (f), and *infra*, B. iii. t. 2, § 19; B. iii. t. 8, § 8, notes. The law of deathbed is abolished; 34 & 35 Vict. c. 81.

(l) So in regard to the rights of husband and wife, the time of the marriage, or of the vesting of the subject, if that is subsequent to the marriage, must be considered. See Inst. l. c.

the body of the Roman Law. None of the German Emperors appear to have expressly confirmed this collection by their authority; but it is generally agreed that it had their tacit approbation, and was considered as the customary feudal law of all the countries subject to the empire. No other country has ever acknowledged these books for their law; but each state has formed to itself such a system of feudal rules as best agreed with the genius of its own constitution. In feudal questions, therefore, we are governed, in the first place, by our own statutes and customs; where these fail us, we have regard to the practice of neighbouring countries, if the genius of their law appears to be the same with ours; and should the question still remain doubtful, we may have recourse to those written Books of the Feus, as to the original plan on which all feudal systems have proceeded.

are not of  
universal  
authority.

By what law  
feudal  
questions are  
to be decided.

Definition of  
feus.

(7)

Feus are now  
patrimonial.

Superior and  
vassal.

Allodial goods.

(8)

3. This military grant got the name, first of *beneficium*, and afterwards of *feudum*; and was defined,—A gratuitous right to the property of lands, made under the conditions of fealty and military service, to be performed to the granter by the receiver; the radical right of the lands still remaining to the granter. Under lands, in this definition, are comprehended all rights or subjects so connected with land that they are deemed a part thereof; as houses, mills, fishings, jurisdictions, patronages, &c. Though feus in their original nature were gratuitous, they soon became the subject of commerce (lib. 1, *Feud.*, t. 6); services of a civil or religious kind were frequently substituted in place of military (lib. 2, t. 2, § 2); and now, of a long time, services of every kind have been entirely dispensed with in certain feudal tenures. He who makes the grant is called the superior, and he who receives it the vassal. The subject of the grant is commonly called the *feu*; though that word is at other times, in our law, used to signify one particular tenure; ii. 4, § 2. The interest retained by the superior in the feu is styled *dominium directum*, or the superiority; and the interest acquired by the vassal, *dominium utile*, or the property. The word fee is promiscuously applied to both.

4. Allodial goods are opposed to feus; by which are understood, goods enjoyed by the owner, independent of a superior.

All moveable goods are allodial; lands only are so when they are given without the condition of fealty or homage. In this sense, all subjects, immoveable as well as moveable, were allodial by the Roman law; but by the feudal system the Sovereign, who is the fountain of feudal rights, reserves to himself the superiority of all the lands of which he makes the grant; so that with us no lands are allodial except those of the King's own property—the superiorities which the King reserves in the property lands of his subjects—and manses and glebes, the right of which is completed by the presbytery's designation, without any feudal grant.<sup>(m)</sup>

5. Every person who is in the right of an immoveable subject, provided he has the free administration of his estate, and is not debarred by statute or by the nature of his right, may dispose of it to another. Nay, a vassal, though he has only the *dominium utile*, can sub-feu his property to a sub-vassal by a subaltern right, and thereby raise a new *dominium directum* in himself, subordinate to that which is in his superior; and so *in infinitum*. The vassal who thus sub-feus is called the sub-vassal's immediate superior, and the vassal's superior is the sub-vassal's mediate superior. Professed or known Papists are debarred, by 1695, c. 26, from granting gratuitous deeds in prejudice to the heir.<sup>(n)</sup>

Who can grant  
feudal rights.

(13)

6. All persons who are not disabled by law may acquire and enjoy feudal rights. Persons excommunicated were declared incapable of possessing their own lands, and no charter of resignation or of adjudication of lands holden of the Crown was allowed to be passed in their favour (1609, c. 3, 4, ratified by 1661, c. 25); but these disabilities are taken off, 1690, c. 28. Papists<sup>(n)</sup> cannot purchase a land estate by any voluntary deed, 1700, c. 3. Aliens who owe allegiance to a foreign Prince cannot hold a feudal right without naturalisation; and therefore, where such privilege was intended to be given to favoured nations or persons, statutes of naturalisation were necessary, either general (1558, c. 65, 66; 1669, c. 7) or special; or at least letters of naturalisation by

Who can re-  
ceive them.

(16)

Aliens cannot  
hold a feu.

(iii. 10. 10)

(m) Except, also, *udal* lands in Orkney and Shetland; Inst. ii. 3, 18.

(n) Papists are relieved from all such disabilities by 33 Geo. III. c. 44; 10 Geo. IV. c. 7; and 7 & 8 Vict. c. 102.

the Sovereign.(o) The Act 1694, c. 216, prohibiting all members of any court of justice to buy claims of heritable rights depending in court, does not annul the sale, though it subjects the buyer to deprivation; *Purves v. Keith*, Dec. 20, 1683, M. 9500.

What subjects  
may be granted  
in feu.

(14, 15)

*Jus super-  
veniens accre-  
cit emptori.*

7. Every heritable subject capable of commerce may be granted in feu. From this general rule is excepted, (1) the annexed property of the Crown, which is not alienable without a previous dissolution of Parliament; (2) tailzied lands, which are devised under condition that they shall not be aliened; (3) an estate *in hæreditate jacente* cannot be effectually aliened by the heir-apparent (*i.e.*, not entered); (*p*) but such alienation becomes effectual upon his entry, the supervening right accruing in that case to the purchaser; which is a rule applicable to the alienation of all subjects not belonging to the vendor at the time of the sale.(*q*) Leases of the rents or revenues of boroughs-royal, whether proceeding from lands, fishings, mills, &c., for more than three years, are prohibited by 1491, c. 36; but as there is no prohibition with regard to leases or feus of the lands themselves, these may be effectually granted by the magistrates notwithstanding the statute; *Dean v. Mags. of Irvine*, M. 2522.(*r*)

Feudal  
charter.

(17)

(19)

8. The feudal right, or as it is called investiture, is constituted by charter and seisin. By the charter we understand that writing which contains the grant of the feudal subjects to the vassal,(*s*) whether it be executed in the proper

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(o) *Leslie v. Forbes*, 1749, M. 4636; *Dundas v. Dundas*, Nov. 15, 1839, 2 D. 31. See *Goldston v. Young*, Dec. 8, 1868, 7 Macph. 188. The disabilities of aliens in the matter of acquiring feus have been modified and practically abolished by a series of statutes, and, among others, 7 Anne c. 5; 7 & 8 Vict. c. 66; 33 Vict. c. 14; 33 & 34 Vict. c. 102.

(*p*) By the Conveyancing Act (1874), 37 & 38 Vict. c. 94, § 4, a personal right to lands vests in an heir without any procedure, by the mere fact of his survivance of the person he is entitled to succeed.

(*q*) See Inst. ii. 7. 3, 4.

(*r*) If authorised by an Act of Council; *Mags. of Selkirk v. Clapperton*, June 11, 1828, 6 S. 955. And feus, alienations, or leases for more than one year, can only be disposed of by auction, and after due advertisement, in the manner prescribed by 3 Geo. IV. c. 91.

(*s*) The term charter is here used in a wide sense. More strictly it

form of a charter or of a disposition. Charters by subject-<sup>Charter</sup> superiors are granted either (1) *a me de superiore meo*, when *a me*, they are to be holden, not of the granter himself, but of his superior. This sort is called a public holding, because vassals were in ancient times publicly received in the superior's court before the *pares curiæ* or co-vassals: or (2) *de me*,<sup>de me;</sup> where the lands are to be holden of the granter. These were called sometimes base rights, from *bas* (lower), and sometimes private, because, before the establishment of our records, they were easily concealed from third parties; the nature of all which will be more fully explained, tit. 7. An original charter is that by which the fee is first granted: a original, charter by progress is a renewed disposition of that fee; *e.g.*, by progress, a charter by a superior to the heir of his vassal, or by a vassal to a singular successor to be holden of the granter's superior, or a charter of adjudication. All doubtful clauses in charters by progress ought to be construed agreeably to the original grant; and all clauses in the original charter are understood to be implied in the charters by progress, if there be no express alteration; Craig, 190, § 27; 299, § 9.

9. The first clause in an original charter which follows<sup>Its constituent parts.</sup> immediately after the name and designation of the granter<sup>(21, 22, 23)</sup> is the narrative or recital, which expresses the causes inductive of the grant. If the grant be made for a valuable con-<sup>The narrative.</sup> sideration, it is said to be onerous; if for love and favour, gratuitous. In the dispositive clause of a charter,<sup>(t)</sup> the<sup>The dispositive clause.</sup>

means what is here termed a charter *de me*, and creates a new holding by the grantee as vassal of the granter. The deed by which a feudal right is transmitted is a *disposition*.

(t) It was "an inviolable rule of the feudal law of Scotland that an estate cannot be conveyed by mere expression of will. There must be words *de presenti* conveying the lands;" *Ogilvie v. Mercer*, 1797, 1 Ross's L. C. 13, M. 3340, aff. 3 Pat. 434. Even words which import a *de presenti* conveyance were insufficient if the word "dispose" was wanting; see *Howden v. Glassford*, July 7, 1864, 2 Macph. 1317; *Kirkpatrick v. Kirkpatrick*, March 19, 1873, 11 Macph. 557, H. L. 1 Ret. 37. This rule was relaxed, in the case of testamentary or *mortis causa* deeds purporting to convey or bequeath lands granted by any person alive at 31st July 1868, by 31 & 32 Vict. c. 101, § 20; and by the Conveyancing Act, 1874, 37 & 38 Vict. c. 94, § 27, it was enacted that the absence of the word *dispose* should be no objection to the validity of any deed as a

subjects made over are described either by special boundaries or march-stones (which is called a bounding charter), or by such other characters as may sufficiently distinguish them.(u) In this clause is also expressed the order of succession and limitation of the fee, which were, by our more ancient style, inserted in the clause of *tenendas*.(v) A charter regularly carries right to no subjects but what are contained in this clause, though they should be mentioned in some other clause of the charter.(w) In charters by progress a clause of *novodamus* is sometimes thrown in, whereby the superior grants of new (*de novo*) certain subjects specially mentioned. Such charters have the effect of an original grant as to these subjects, and consequently imply a release to the vassal of all burdens affecting the property prior to such grant. They are generally no more than renewed rights of some subject

A clause of  
*novodamus*.

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conveyance of heritage coming into operation after the passing of the Act "provided it contains any other word or words importing conveyance or transference or present intention to convey or transfer."

(u) Where the lands have been particularly described in any prior recorded conveyance, it is sufficient to specify "some leading name or names, or some distinctive description of the lands as contained in the titles thereto, and to specify the county," or in burgh lands, the burgh and county, and to refer to the particular description in the prior recorded deed; 30 & 31 Vict. c. 101, § 11.

(v) In this, as in other matters, the dispositive is the ruling clause, and, in the event of any discrepancy between it and one of the executive clauses, it controls the other; *Shanks v. Kirk-Session of Ceres*, 1797, M. 4295; *Forrester v. Hutchison*, July 11, 1826, 4 S. 831. But effect has been given to a subsequent addition to the destination, supplying an omission in the dispositive clause, but not positively inconsistent with it; *Sutherland v. Sinclair*, 1801, M. App. "Tailzie," 8. See next note.

(w) The specification referred to here and in § 10 was long ago dropped out of charters by subjects, and has not been used in Crown-charters since 10 & 11 Vict. c. 51; see 31 & 32 Vict. c. 101, Sch. T. Even when used, the specification was of no avail to extend the dispositive clause, which was held to rule the extent of the grant; *E. Aboyme v. Farquharson*, Nov. 16, 1814, F.C., aff. 6 Pat. 380. But a reservation of minerals in the *tenendas* was held effectual, although the dispositive clause was unlimited; *Bain v. Hamilton*, May 19, 1865, 3 Macph. 821. As to the general effect of the other clauses of a charter in explaining the dispositive clause, see *Lord Advocate v. Sinclair*, June 7, 1867, 5 Macph. H.L. 97.

that had been formerly granted to the vassal ; yet every subject contained in the clause of *novodamus* is deemed to be conveyed to the vassal, though there should have been no antecedent title to it in his person ; *Scott v. Archbishop of Glasgow*, Feb. 29, 1680, M. 9339 ; *Heritors of Spey*, July 14, 1737, M. 9342.(x)

10. The clause of *tenendas* (from its first words *tenendas prædictas terras*) expresses the particular tenure by which the lands are to be holden, and frequently contains a long and unnecessary enumeration of the parts and pertinents of the subject made over in the charter. The clause of *reddendo* (from the words *reddendo inde annuatim*) specifies the particular duty or service which the vassal is to pay or perform to the superior ; and hence the duty itself, to which the vassal is subjected, has got the name of the *reddendo*.(y)

The *tenendas*.

(24)

The *reddendo*.

(24)

11. The clause of warrandice(z) is that by which the

Clause of warrandice.

(x) But a charter of *novodamus*, except as against the superior and when followed by prescriptive possession, is of no avail as a title to subjects which the superior has already granted by a valid feudal title, and which have not been resigned in his hands ; *Grieve v. Williamson*, 1760, M. 3022.

(25, 26)

(y) " Since *Hunter v. Boog*, Dec. 16, 1834, 13 S. 205, it is fixed that a charter accepted by the vassal is substantially a mutual contract which the vassal cannot *refute* or get quit of *invito superiori*." (But see *infra* as to the effect of the Conveyancing Act of 1874.) " These two clauses, the dispositive on the one hand, and the *reddendo* on the other, contain the essence of the contract. But some subsidiary clauses are added to fortify the title of the vassal, or facilitate the completion of his title."—*MOIR*.

(z) This clause is now usually in the form prescribed by (10 & 11 Vict. c. 48, § 2, now) 31 & 32 Vict. c. 101, § 8, viz.—" And I grant warrandice ;" which is declared to imply, unless specially qualified, absolute warrandice as regards the lands and writs and evidents, and warrandice from fact and deed as regards the rents. " The clause of assignation of writs and evidents is another clause introduced for the vassal's security. By the statutory form (31 & 32 Vict. c. 101, § 8) the words prescribed are : ' I assign the writs, and have delivered the same according to inventory ; ' and import, unless qualified, an assignation to all writs, evidents, open procuratories, and precepts to which the disponer has right. But this assignation will not carry collateral rights not essential to the right of property in the land ; *Graham v. Don*, Dec. 15, 1814, F.C. ; *Hamilton v. Montgomery*, Jan. 28, 1834, 12 S. 349. The doubt

Assignation of writs.

Personal warrandice is either simple, or from fact and deed,

or absolute.

Implied warrandice.

(29)

granter obliges himself that the right conveyed shall be effectual to the receiver. Warrandice is either personal or real. Personal warrandice (where the granter is only bound personally) is either (1) simple, that he shall grant no deed in prejudice of the right; and this sort, which is confined to future deeds, is implied even in donations; or (2) warrandice from fact and deed, by which the granter warrants that the right neither has been nor shall be hurt by any fact of his. This is generally granted where rights are compounded for less than the sums contained in them; and sometimes the clause is so conceived as to reach also to the deeds of the granter's ancestors or authors, from whom he himself derives his right. Or (3) absolute warrandice *contra omnes mortales* (warrandice at all hands, and against all deadly), whereby the right is warranted against all legal defects in it, which may carry it off from the receiver, either wholly or in part. Where a sale of land proceeds upon an onerous cause, the granter is liable in absolute warrandice, though no warrandice be expressed; but in assignations to debts or decrees no higher warrandice than from fact and deed is implied; *Riddel v. White*, March 4, 1707, M. 16,615; which is also the doctrine of the Roman law, l. 4, *de hæred. vel act. vend.* (18, 4).(a)

12. Warrandice cannot extend to burdens which may affect the subject after the grant, whether they shall arise

which appeared to be thrown on this principle by *Lennox v. Hamilton*, July 14, 1843, 5 D. 1357, seems to be removed by *Stewart v. Duke of Montrose*, Feb. 15, 1860, 22 D. 755, aff. March 27, 1863, 4 Macq. 499, 1 Macph. H.L. 25. It was there held that a mere general assignation of writs could not carry right to an obligation of relief against minister's stipend, though in the particular case, which was one between superior and vassal, it was found that the obligation of relief, being contained in the original feu-contract, enured to the vassal without any special assignation."—MORR. See *infra*, notes to § 12.

Assignation of rents.

The clause of assignation to rents (for which also a short form and meaning are prescribed by the statute cited) gives the grantee a title before infestment to recover the rents payable by tenants and occupiers of the land, but it does not enable him to compete with a creditor holding a completed real right; *Bell's Com.*, i. 757.

(a) *Ferrier v. Graham*, May 16, 1828, 6 S. 818; *Russell v. Mudie*, Nov. 28, 1857, 20 D. 125.

from misfortune (e.g., inundation) or from statute; (b) for the receiver, as he has the whole benefit arising from its improvement after that period, must run all the hazards of its deterioration; *Watson v. Law*, July 12, 1667, M. 16,588. Nay, this doctrine holds where the supervening burden is imposed under the authority of a public law prior to the grant, unless the receiver, who is presumed to know the burden which by law may be imposed on the subject, has taken care to secure himself against it by express warrandice; *L. Auchintoul v. L. Innes*, July 1, 1676, M. 16,603; *Lumaden v. Gordon*, Jan. 6, 1682, M. 16,606. (c) Gratuitous grants by the Crown imply no warrandice; and though warrandice should be expressed, the clause is ineffectual, from a presumption that it has crept in by the negligence of the Crown's officers. But where the Crown makes a grant, not *jure coronæ*, but for an adequate price, the Sovereign is in the same case with his subjects, and liable to the same degree

How far grants by the Crown imply warrandice.

(27)

(b) The rule is, that in an obligation of warrandice or relief from public burdens expressed in general terms, parties are not held to have had in view burdens imposed under statutes subsequent to the date of the charter; *Scott v. Edmond*, June 25, 1850, 12 D. 1077; but assessments under the Act 8 & 9 Vict. c. 43 (Poor Law Amendment Act), are held not to be burdens imposed by a supervening law; *Lees v. Macbriolay*, Nov. 11, 1857, 20 D. 6; *Hunter v. Chalmers*, June 16, 1858, 20 D. 1311; *Campbell's Tra. v. Dingwall*, Nov. 17, 1865, 4 Macph. 50.

(c) Such stipulations of relief must be very clear. Thus, an obligation to relieve from stipend, imposed or to be imposed, which is a burden natural to a right of teinds, does not apply to future *augmentations* of stipend, which must be expressly mentioned; *Alexander v. Dundas*, June 9, 1812, F.C. Various important questions have been raised with regard to the transmission to successors of rights and liabilities under such clauses. "When granted by the superior to the vassal of the lands and teinds out of which the augmentation becomes payable, such obligation, being part of the feudal contract, does not require express assignation, but passes to heirs and disponees with the lands, and is renewed with every renewal of the investiture in the lands and teinds granted by the superior; *Lennox v. Hamilton*, July 14, 1843, 5 D. 1357; *Stewart v. D. of Montrose*, Feb. 15, 1860, 22 D. 755, aff. March 27, 1863, 4 Macq. 499. But when the relation of superior and vassal does not exist between the granter and grantee of the obligation, when (as it is said) there is no 'privity' between these parties, it stands in the position of an ordinary personal obligation; and in such case, although the ordinary obligation of warrandice will pass

Absolute warrandice in the assignation of a debt.

of warrandice with them, according to the nature of the right. Absolute warrandice in the assignation of a debt imports only that the debt is really due, and free from all legal exceptions, but not that the debtor is solvent; and this holds though the sums contained in the debt should be warranted to be effectual to the assignee; *Liddel v. Barclay*, Dec. 12, 1671, M. 16,594.

The effects of warrandice.

(30)

13. Absolute warrandice, in case of eviction, affords an action to the grantee against the granter for making up to him all that he shall have suffered through the defect of the right, and not simply for his indemnification by the granter's repayment of the price to him. This obtains not only in irredeemable but in redeemable grants; for in both the warrandice strikes against all defects in the right itself; yet as warrandice is penal, and consequently *stricti juris*, it is not easily presumed, nor is it incurred from every light servitude that may affect the subject; *Sandilands v. E. of Haddington*, June 21, 1672, M. 16,599. Regularly the grantee, when the eviction is threatened, ought to intimate his distress to the granter, that he may defend the right granted by himself; but though such intimation should not be made, the grantee does not lose his right of recourse, unless it shall appear that in the process of eviction he has omitted a relevant defence, or subjected himself to an incompetent means of proof; *Clerk v. Gordon*, June 23, 1681, M. 16,605; *Gordon v. Gordon*, 1748, M. 14,045.(d)

(31, 32)

Intimation of distress.

to the new owner by a conveyance of the lands with the writs, an obligation of warrandice against ministers' stipend, or augmentations thereof, or other public or parish burdens, will not pass without a special assignation, or its equivalent; *Horne v. Breadalbane's Trs.*, Jan. 23, 1841, 3 D. 435, rev. Feb. 21, 1842, 1 Bell's App. 1. The same principle ruled the cases of *Sinclair v. Breadalbane*, Jan. 16, 1844, 6 D. 378, rev. August 14, 1846, 5 Bell's App. 353; *Spottiswoode v. Seymour*, March 2, 1853, 15 D. 458."—MONTGOMERIE BELL, Lectures on Conveyancing, ii. 644. See *Hope v. Hope*, Feb. 20, 1864, 2 Macph. 670; *Stewart v. M'Callum*, Feb. 14, 1868, 6 Macph. 382.

(d) A purchaser is not bound to defend an untenable right; *Downie v. Campbell*, Jan. 31, 1815, F.C.; nor to wait for the actual issue of the action of eviction, before bringing his action of relief; *Lord Melville v. Wemyss*, Jan. 14, 1842, 4 D. 385.

14. Real warrandice is either—(1) Express, whereby, <sup>Real warrandice.</sup> in security of the lands principally conveyed, other lands, <sup>(28)</sup> called warrandice-lands, are also made over, to which the receiver may have recourse, in case the principal lands be evicted; or (2) Tacit, which is constituted by the exchange <sup>Excambion.</sup> or excambion of one piece of ground with another; for if the lands exchanged are carried off from either of the parties, the law itself, without any paction, gives that party immediate recourse upon his own first lands, which he had given in exchange for the lands evicted, even though a third person should have acquired a real right in them prior to the eviction; *E. Melrose v. Ker*, Nov. 25, 1623, M. 3677.(e)

15. But this holds only where the grant by which the lands are exchanged is expressly said to be an excambion. The charter concludes with a precept of seisin, <sup>(f)</sup> which <sup>Precept of seisin.</sup> is the command of the superior, granter of the right, to his bailie, for giving seisin or possession to the vassal, or his attorney, by delivering to him the proper symbols. Possession was, in the infancy of feus, given by the superior himself to the vassal, immediately upon granting the charter, in presence of the *pares curiæ* (the name given to the co-vassals, who were equal to one another in the superior's court); and this was styled the proper investiture, by which <sup>Proper investiture.</sup> the vassal's right was completed *unico contextu*. <sup>Precepts must now be engrossed in the charter.</sup> Precepts or letters of seisin, when they were first introduced, were made out in writings separate from the charter; but now all precepts on charters flowing from the Crown must be engrossed <sup>(33)</sup> in the charter or disposition by Act 1672, c. 7, which by custom was soon extended to the case of all precepts without distinction. Any person whose name may be inserted in the blank left in the precept for that purpose, <sup>(g)</sup> can execute the

(e) See *L. Wards v. L. Balcomy*, July 14, 1629, M. 3678.

(f) See *infra*, § 17, note (k). The precept of sasine is no longer a necessary part of any conveyance of land; 31 & 32 Vict. c. 101, § 5, repeating 21 & 22 Vict. c. 76, § 5. If it should now be inserted, a short form is provided by 8 & 9 Vict. c. 35.

(g) In practice the name of the bailie was not filled up in the blank; even after infeftment was taken and the instrument registered, the blank remained in the precept.

precept as bailie; and whoever has the precept of seisin in his hands is presumed to have a power of attorney from the vassal for receiving possession in his name.<sup>(h)</sup>

Instrument of  
seisin,

(34)

at first not  
used,

now an  
essential  
solemnity.

Symbols used  
in seisins.

(36, 38)

Seisin *propria*  
*manibus*.

16. A seisin is the instrument or attestation of a notary that possession was actually given by the superior or his bailie to the vassal or his attorney; and it sometimes gets the name of infeftment, though that word, in its proper sense, signifies the whole feudal right; Craig, 187, § 18. For a long time, the appending of the bailie's seal to the superior's charter or precept (Craig, 238, § 2), and sometimes his separate declaration that he had given seisin, completed the vassal's right, without the attestation of a notary. But afterwards a notarial instrument came to be considered as a necessary solemnity, not suppliable either by a proof of natural possession or even of the special fact that the vassal was duly entered to the possession by the superior's bailie.

17. The symbols by which the delivery of possession is expressed, are:—for lands, earth and stone; for rights of annualrent payable forth of land it is also earth and stone, with the addition of a penny money; for parsonage-teinds, a sheaf of corn; for jurisdictions, the book of the court; for patronages, a psalm-book and the keys of the church; for fishings, net and coble; for mills, clap and happer, &c.<sup>(i)</sup> The seisin must be taken upon the ground of the lands,<sup>(k)</sup> except where there is a special dispensation, as in the seisins of Nova Scotia (Stair, ii. 3, § 18). Seisins given not by the bailie in virtue of a precept, but *propria manibus* of

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(h) But this may be redargued; Inst. l. c.; Gray, Dec. 13, 1838, 1 D. 227.

(i) It was fatal if erroneous symbols were set forth in the instrument of sasine, which was an *actus legitimus* requiring the strictest observance of all forms; *Town Council of Brechin v. Arbuthnot*, Dec. 11, 1840, 3 D. 216; but specification was not required in the precept, and apparently not in the instrument; *Barstow v. Stewart*, Feb. 18, 1858, 20 D. 612.

(k) "The actual ceremony of passing to the lands and giving sasine there was abolished by 8 & 9 Vict. c. 35, and the recording of an instrument of sasine in an abbreviated form is sufficient. But the theory of the law remains the same, that the right of the vassal is completed by infeftment, and that until infeftment be taken he has no *real right* in the lands."—MOIR. See *infra* note (m), as to more recent legislation.

the granter, are generally used in rights granted to wives, children, or other conjunct persons. When such seisin is neither subscribed by the granter nor supported by a separate warrant from him, it is null, being the bare assertion of a notary; *King v. Chalmers*, 1682, M. 12,523.(l)

18. A short abbreviate of all seisins,(m) whether flowing from the Crown (1540, c. 79), or from a subject (1555, c. 46, &c.), was directed to be entered into a record of exchequer, for the benefit of all having interest; but a more certain provision was made in the reign of James VI. for the security of purchasers and creditors, by an unprinted statute passed at Falkland, July 31, and recorded in the books of sederunt, Nov. 3, 1599; and by another made in the year thereafter, mentioned in the index of the unprinted Acts, 1600, No. 34, (n) whereby the full tenor of seisins, &c., was to be registered in the secretary's register within forty days after their date, under the certification of nullity. These statutes were but little observed (Act S., Jan. 6, 1604), wherefore a third Act was made (1617, c. 16), directing all seisins, and other real rights therein mentioned, to be registered within sixty days (o) after their date, either in the General Register of Seisins

Registration of  
seisins,  
(39, 40)

required by  
statute,

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(l) A short form of investiture *propris manibus* is provided by 31 & 32 Vict. c. 101, § 15.

(m) Since the Titles to Land Acts of 1858 and 1860 (21 & 22 Vict. c. 76; 24 Vict. c. 143), re-enacted with variations by 31 & 32 Vict. c. 101, it is not necessary to expedite and record an instrument of sasine; but it is made competent and sufficient for the grantee of a conveyance to record the conveyance itself in the Register of Sasines. The conveyance being presented with a warrant of registration thereon, specifying the person on whose behalf it is presented, and the county or counties where the lands lie (31 & 32 Vict. c. 64, § 4), and signed by him or his agent, and being registered along with the warrant, has the same legal force as if it had been followed by a duly recorded sasine. If it is unnecessary or undesirable to put the whole of the deed on record, a notarial instrument may be expedite and recorded, or the granter may, by a clause of direction, specify what part of the deed he wishes to be recorded. An assignee of an unrecorded conveyance may be infeft by recording in like manner the conveyance in whole or in part, and the assignation or assignations by which he has obtained right to it, or by recording a notarial instrument.

(n) Thomson's Acts, vol. iv. pp. 184, 237.

(o) Instruments of sasine, by 8 & 9 Vict. c. 35, § 3, and conveyances,

at Edinburgh, or in the register of the particular shire appointed by the Act;(p) which, it must be observed, is not, in every case, the shire within which the lands lie.

(40, 41)

except seisins  
of burgage  
tenements.

That exception  
now taken off.

19. This Act does not, as the two former, render unregistered seisins null; they are indeed declared ineffectual against third parties, but they are valid against the granters and their heirs.(q) From this statute were excepted seisins of burgage tenements, probably from an opinion of the exactness with which the town-clerks, who alone could be notaries thereto (1567), c. 27,(r) booked them in their protocols or registers, which lie open to all the lieges; but as this exactness sometimes failed (*Burnet v. Swan*, June 30, 1668, M. 13,550), burgage seisins were ordained to be registered in the books of the borough, 1681, c. 11.(s)

and all deeds and instruments authorised by the Act 31 & 32 Vict. c. 101, to be recorded in the Register of Sasines, may now be recorded at any time in the lifetime of the person on whose behalf they are presented for registration; 31 & 31 Vict. c. 101, § 142.

(p) The Particular Registers of Sasines are now abolished by 31 & 32 Vict. c. 64. Separate books for each county are kept in the General Register.

(q) It is more correct to say that an unregistered sasine is "absolutely null and void, though the granter (of the right) and his heirs cannot plead the nullity;" *Kibble v. Stewart*, June 16, 1814, F.C. The very purpose of a sasine is to create a real right in the grantee; and "when it is said that the statute annuls the instrument only *qualificati*, i.e., in prejudice of a third party who has acquired a perfect right to the lands, it is overlooked that the very qualification excludes the notion of a real right. . . . It is only a circumlocution for declaring the sasine to be null. . . . The verbal qualification and exception are mere surplusage; for in reality the result is this, that the unregistered sasine shall make no faith, i.e., shall be null, in all cases in which it is material to the issue to inquire whether it be a good sasine or not."—*Per* Lord Fullerton, in *Young v. Gordon's Trs.*, March 11, 1847, 9 D. 932, aff. Sept. 1, 1848, 2 Ross L. C., 103. A mistake in registration may now be corrected by recording of new with the original, or, it may be, a new warrant of registration; 31 & 32 Vict. c. 101, § 143.

(r) No town-clerk appointed after March 18, 1860, has any such exclusive privilege. See 31 & 32 Vict. c. 101, §§ 151, 153.

(s) Sasines of property belonging to a burgh, but held in feu, and granted out by the burgh in feus, are null if recorded in the burgh register; *Town Council of Brechin v. Arbuthnot*, Dec. 11, 1840, 3 D. 216; *E. Fife's Trs. v. Mags. of Aberdeen*, May 25, 1843 4 D. 1245. See B. ii.,

20. The attestation of the keeper of the records, on the back of the seisin, that it was registered, was deemed a sufficient registration; 1686, c. 19. But as this weakened the security intended from the records to singular successors, the actual booking of seisins, and of other writings presented for registration, is now required; 1696, c. 18. Seisins regularly recorded are preferable, not according to their own dates, but the dates of their registration (1693, c. 13), the reason whereof may be gathered from the next Act; 1693, c. 14.(t)

What is considered as registration.

(42)

21. Seisin necessarily supposes a superior by whom it is given; the right, therefore, which the Sovereign, who acknowledges no superior, has over the whole lands of Scotland, is constituted *jure coronæ* without seisin. In several parcels of land that lie contiguous to one another one seisin serves for all, unless the right of the several parcels be either holden of different superiors or derived from different authors; *Bank of Scotland v. Ramsay*, July 1729, M. 16, 404, or enjoyed by different tenures under the same superior. In discontinuous lands a separate seisin must be taken on every parcel,(u) unless the Sovereign has united them into one tenandry by a charter of union; in which case if there is no special place expressed, a seisin taken on any part of the united lands will

Crown's right constituted without seisin.

(44, 45)

One seisin serves in contiguous and in united tenements.

t. iii., § 4, note. But if feus have been or are hereafter granted of lands held burgage before 1874, all writs affecting them must be recorded in the Burgh Register of Sasines; and lands held by Booking tenure in Paisley must be recorded in the Register of Booking there; 37 & 38 Vict. c. 94, § 25.

(t) Formerly the date of registration depended on the entry in the minute book; *MacLaine v. MacLaine*, June 16, 1852, 14 D. 870, aff. July 6, 1855, 27 Jur. 550. It was provided by 8 & 9 Vict. c. 35, that the date of presentment and entry set forth on the instrument of sasine by the keeper of the record should be held the date of infeftment. The date of entry in the minute-book is now the date of registration, 31 & 32 Vict. c. 101, § 142; but where the keeper of the register receives two or more writs by the same post, they are to be held as presented and registered contemporaneously; 31 & 32 Vict. c. 64, § 6.

(u) By 8 & 9 Vict. c. 35, § 1, the short form of instrument of sasine thereby provided is effectual whether the land be contiguous or discontinuous, or are held by the same or different titles, or of one or more superiors. The same is necessarily the effect of recording the disposition under 31 & 32 Vict. c. 101, § 15.

serve for the whole, even though they be situated in different shires. The only effect of union is to give the discontiguous lands the same quality as if they had been contiguous or naturally united; union, therefore, does not take off the necessity of separate seisins in lands holden by different tenures, or the rights of which flow from different superiors, these being incapable of natural union. Where the Sovereign unites lands, he generally, in the clause of union, declares the symbol of earth and stone to be sufficient for expressing the delivery, not only of the lands themselves, but of all other feudal rights or subjects conveyed by the charter, let them be ever so different in their nature, *e.g.*, fishings, mills, patronages, &c.

Barony implies union.

(46, 47)

22. The privilege of barony carries a higher right than union does, and consequently includes union in it as the lesser degree. This right of barony can neither be given nor transmitted, *(v)* unless by the crown (*Stair*, ii. 3, § 45); but the quality of simple union being once conferred on lands by the Sovereign, may be communicated by the vassal to a sub-vassal; *Stuart v. Coldingham Feuars*, Jan. 22, 1627, M. 6623. Though part of the lands united or erected into a barony be sold by the vassal to be holden *a me*, the whole union is not thereby dissolved; what remains unsold retains the quality.

All privileges must be expressed in the charter.

*(w)* These and all other feudal privileges must be granted in the charter, not in the seisin: for the seisin is not intended to confer any new right, but merely for completing such right as is before given by the charter.

A charter becomes real only after seisin.

(48)

23. A charter not perfected by seisin is a right merely personal, which does not transfer the property (iii. 1, § 1), and a seisin of itself bears no faith without its warrant. It is the charter and seisin joined together *(x)* that constitutes the

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*(v)* *I.e.*, by a base or subaltern infestment; for a baron may make over his barony to be holden immediately of the Crown; *Inst.* l. c.

*(w)* As well as the part alienated; *Montgomery v. Dalrymple*, March 2, 1813, F.C.; *Heron v. Syme*, 1771, M. 8684. And this union is equally applicable to a sasine on a right in security; *Wood's Trs. v. White's Trs.*, July 6, 1832, 10 S. 773, aff. 7 W. & S. 147.

*(x)* Or, according to modern practice, title recorded, in virtue of a warrant also recorded in the appropriate register of sasines.

feudal right, and secures the receiver against the effect of all posterior seisins, even though the charters on which they proceed should be prior to his; and, still more, against all qualities burdening his author's right, contained in latent personal declarations or back-bonds which have not been rendered litigious before his seisin.

24. No quality which is designed as a lien or real burden on a feudal right can be effectual against singular successors, if it be not inserted in the investiture. By our former practice the burden must have been fully expressed in the seisin, which is made public by the record; *Lady Monboddo v. Hali-burton*, Nov. 27, 1711, M. 10,304; but it was found (*Creditors of Smith v. Smiths*, July 26, 1737, M. 10,307; Elch. "Personal and Real"), that a general reference in the seisin to the burdens specially contained in the charter, was sufficient to make a real burden; for that the charter is truly a part of the investiture.(y) If the creditors in the burden are not particularly mentioned, the burden is not real; for no perpetual unknown encumbrance can be created upon lands; *Creditors of Maclellan*, July 1734, n. r. On the same principle, a faculty reserved to the granter to charge the lands with a certain sum to be paid to any person he shall name, is not effectual against singular successors if he does not properly exercise that faculty, by granting an heritable bond for the sum, and giving seisin thereon; *Ogilvies v. Turnbull*, June 21, 1737, M. 4125. When the right itself is granted with the burden of the sum therein mentioned, or where it is declared void if the sum be not paid against a day certain, the burden is real; but where the receiver is simply obliged by his acceptance to make payment, the clause is effectual only against him and his heirs; *Ballantine v. Dundas*, 1685, M. 10,238.(z)

All real burdens must be inserted in the investiture.

(49, 51)

What burdens are deemed real.

(50)

(y) "There can be no real burden on lands which is incapable of being discovered by creditors and purchasers;" Inst. l. c. It is sufficient to refer to real burdens as set forth in the original conveyance or in any subsequent deed forming part of the progress of titles and recorded in the Register of Sasines; 31 & 32 Vict. c. 101, § 10.

(z) "The simplest form of heritable security is by 'a real burden on land.' The lands are disposed with a declaration that they shall be

## TIT. IV.—OF THE SEVERAL KINDS OF HOLDING.

(1, 2)

1. Feudal subjects are chiefly distinguished by their different manners of holding, which were either ward, blanch, feu, or burgage. Ward-holding (which is now abolished by

Ward-holding

burdened with the payment of a sum of money to a person named, or with some other legal condition or prestation. The leading rules are :— (1) That the burden must be unequivocally laid on the lands themselves, and not left on the footing of a personal obligation on the donee. No real obligation can be created by words such as those used in *Mackenzie v. Lord Lovat*, April 1, 1721, Robertson's App. 355, where it was only provided that the donee should stand burdened with the payment of the lawful debts of the granter, and this was repeated both in the procuratory of resignation and precept of sasine. In *Martin v. Paterson*, June 22, 1808, F.C., M. App. 'Personal and Real,' 5, the leading case on the subject, the words imposing the burden were that the donee, 'by acceptance of the deed, shall be bound and obliged to make payment to,' &c. The precept of sasine directed infestment to be given under the burdens specified; infestment followed; and in the sasine the burden was specified in terms of the above dispositive clause. A majority of the Court held, that 'without requiring any technical form of expression, the intention to impose a burden on land by reservation should be expressed in the most explicit, precise, and perspicuous manner. In a clause by which onerous singular successors are to be affected, there must be no room for ambiguity; but the present instance admits of a doubt, and therefore the obligation ought not to be held as constituting a real burden.' See *Macintyre v. Masterton*, Feb. 3, 1824, 2 S. 664. The question therefore in every case is, whether, according to the fair legal meaning of the words used, the burden is laid on the lands themselves? Three other requisites must concur to render a real burden effectual. The name of the creditor in whose favour the burden is constituted must be given; the exact amount of the burden, if it be of the nature of a money payment, must be specified (for no burden indefinite in amount can be constituted over land); and lastly, the burden must appear on the face of the infestment."—MOIR. *Stenhouse v. Innes*, Feb. 21, 1765, M. 10,264; *Allan v. Cameron's Crs.*, 1780, M. 10,265, aff. 2 Pat. 572; *Macdonald v. Place*, 1821, Hume 544; *Erskine v. Wright*, June 24, 1846, 2 D. 863; *Baird's Trs. v. Mitchell*, Feb. 6, 1846, 8 D. 464.

Ground-annual.

A method of constituting heritable rights by creating real burdens where sub-infeudation cannot be resorted to has risen into much importance since Erskine wrote. This is accomplished by the contract of ground-annual. The subject is disposed to be held public—not for a price, but for a perpetual annuity, which is reserved and

20 Geo. II. c. 50) was that which was granted for military service. Its proper *reddendo* was services, or services used and wont; by which last was meant the performance of service whenever the superior's occasions required it. As all feudal rights were originally held by this tenure, ward-holding was *in dubio* presumed. Hence, though the *reddendo* had contained some special service or yearly duty, the holding was presumed ward if another holding was not particularly expressed. was originally presumed.

2. Feu-holding is that whereby the vassal is obliged to Feu-holding; pay to the superior a yearly rent in money or grain, and sometimes also in services proper to a farm, as ploughing, reaping, carriages for the superior's use, &c., *nomine feudi firmæ*. It has a strong resemblance to the Roman *emphyteusis*, in the nature of the right, the yearly duty payable by the vassal, the penalty in case of not punctual payment, and the restraint frequently laid upon vassals by their feucharters not to alien without the superior's consent; but all clauses *de non alienando* are now prohibited by the foresaid statute for abolishing ward-holdings.<sup>(a)</sup> This kind of tenure was introduced for the encouragement of agriculture, the improvement of which was considerably obstructed by the (5, 6) its resemblance to *emphyteusis*.

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declared a real burden, or a bond and disposition in security of the annuity is granted by the purchaser. In either way the obligation may be made to appear in the Register of Sasines. See Bell's Pr. §§ 887, 887a.

(a) "A condition stipulating a right of pre-emption, i.e., that the vassal shall not sell without first offering the subjects to the superior at the same price, appears not to be struck at by 20 Geo. II. c. 50; *Preston v. Earl of Dundonald's Crs.*, March 6, 1805, F.C. By the prohibition against sub-infeudation it is declared that the vassal shall have no power to sell or dispose of the feu to be held of himself or his heirs, but only of or under the superior. The legal validity of such a prohibition was sustained in *Campbell v. Dunn (Blythswood)*, May 28, 1823, 2 S. 341; see 1 W. & S. 690, 6 S. 679. The real doubt in the case of *Campbell* was not as to the superior's right to prohibit sub-infeudation, but as to his power of enforcing that condition by means of a condition that all conveyances of the land should be drawn by the superior's agent, under pain of nullity."—MORE. By the Conveyancing Act of 1874 such conditions are declared null and void, as are all future prohibitions against sub-infeudation; 37 & 38 Vict. c. 94, § 22.

vassal's obligation to military service. The statute which first mentions it is 1457, c. 71, though it appears to have been a tenure known in Scotland as far back as *Leges Burgorum*, c. 100.

Blanch-  
holding.

(7)

When blanch  
duties can be  
exactd after  
the year.

3. Blanch-holding (not unlike the *feudum francum* of the Lombards) is that whereby the vassal is to pay to the superior an elusory yearly duty, as a penny money, a rose, a pair of gilt spurs, &c., merely in acknowledgment of the superiority, *nomine albæ firmæ*. This duty, where it is a thing of yearly growth, if it be not demanded within the year, cannot be exacted thereafter; and where the words *si petatur tantum* are subjoined to the *reddendo*, they imply a release to the vassal, whatever the quality of the duty may be, if it is not asked within the year. The Lords of Exchequer were, by 1606, c. 14, prohibited to exact money as the value of such blanch duties as are by the charter payable not in money, but in other subjects, as a pair of gloves, a stone of wax. By our present practice such duties are sometimes converted in the investitures themselves into a certain sum in money; but, even where they are not, their value continues to be exacted by the Crown.

Burgage-  
holding.

(8, 9)

The burgh  
itself is the  
vassal.

4. Burgage-holding is that by which boroughs-royal hold of the Sovereign the lands which are contained in their charters of erection. This, in the opinion of Craig, 81, § 36, does not constitute a separate tenure, but is a species of ward-holding, with this specialty, that the vassal is not a private person, but a community. And indeed, watching and warding, which is the usual service contained in the *reddendo* of such charters, might be properly enough said, some centuries ago, to have been of the military kind. As the royal borough is the King's vassal, all burgage-holders hold immediately of the Crown. The magistrates, therefore, when they receive the resignations of the particular burgesses, and give seisin to them, act not as superiors, but as the King's bailies specially authorised thereto by 1567, c. 27.(b)

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(b) The distinctions between lands held burgage and lands held feu have been abolished by 37 & 38 Vict. c. 94, § 25. See *supra*, ii. 3, § 19, note.

5. Feudal subjects, granted to churches, monasteries, or Mortification. other societies for religious or charitable uses, are said to be mortified or granted *ad manum mortuam*, either because all casualties must necessarily be lost to the superior, where the vassal is a corporation which never dies, or because the property of these subjects is granted to a dead hand, which cannot transfer it to another. In lands mortified in times of Popery to the Church, whether granted to prelates for the behoof of the Church, or *in puram eleemosynam*, the only services prestable by the vassals were prayers, and singing of masses for the souls of the deceased, which approaches nearer to blanch-holding than ward. The purposes of such grants having been, upon the Reformation, declared superstitious, the lands mortified were annexed to the Crown.(c) But mortifications to universities, hospitals, &c., were not affected by that annexation; and lands may, at this day, be mortified to any lawful purpose, either by blanch or by feu-holding.

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TIT. V.—OF THE CASUALTIES DUE TO THE SUPERIOR.

1. The right of the superior continues unimpaired notwithstanding the feudal grant, unless in so far as the *dominium utile*, or property, is conveyed to his vassal. His infestment in the lands subsists, and his heir is entitled to be vested, not in the superiority only, but in the lands themselves, of which his ancestor had made over the property. Hence he can sue all real actions concerning the lands against every person other than the vassal, or those deriving right from him. See *L. Lag v. Grierson*, Nov. 19, 1624, M. 13,787.(d) The superiority carries a right to the services and annual

Fixed rights of superiority.  
(1, 2)  
  
The yearly *reddendo* is *debitum fundi*.

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(c) By 1587, c. 29.

(d) And he has a title to challenge operations by a third party injurious to the feu, though the vassal may not be inclined to interfere; *M. of Breadalbane v. Campbell*, Feb. 12, 1851, 13 D. 647.

Personal  
services  
abolished.

Casual rights  
of superiority.  
(5 and ii. 4, 3)

Casualty of  
ward.

duties(e) contained in the *reddendo* of the vassal's charter. The duty payable by the vassal is a *debitum fundi*, i.e., it is recoverable, not only by a personal action against himself,(f) but by a real action against the lands. The services with which he is charged, if they are annual, as ploughing, cutting of corns and hay, &c., must be exacted within the year; *L. Carnousy v. Keith*, Jan. 30, 1624, M. 14,493. The services of personal attendance, by hosting, hunting, watching, and warding, due by vassals, are abolished (1 Geo. I. St. 2, c. 54); and, in lieu thereof, the superior is entitled to a certain annual payment, to be fixed by the Court of Session, if the parties themselves cannot settle it.

2. Besides the constant fixed rights of superiority, there are others which, because they depend upon uncertain events,

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(e) If payable in money, the feu-duty is held to be payable half-yearly. No interest is exigible on feu-duties till a judicial demand is made for payment; *Tweeddale v. Aytoun*, March 2, 1842, 4 D. 862.

(f) The question has of late years frequently occurred, how far in feu-charters or feu-contracts the vassal continues liable for the feu-duties after he has alienated the lands. The result of the cases of *King's College of Aberdeen v. Hay*, March 11, 1852, 14 D. 676, rev. Aug. 11, 1854, 1 Macq. 526; *Brown v. Elmsley*, March 26, 1855, 2 Macq. 40; *Small v. Millar*, Feb. 3, 1849, 11 D. 495, rev. March 17, 1853, 1 Macq. 345; *Royal Bank v. Gardyne*, 1 Macq. 358, is, "that if the feu-contract contain a personal obligation for feu-duties or other prestations, or if a similar separate obligation be granted, it will receive effect against the disponent, his heirs, and executors, notwithstanding the transfer of the feu; and this appears only a natural and equitable consequence of allowing the vassal to alienate, and to force on the superior a new vassal in poor or embarrassed circumstances. At the same time, nothing in these cases interferes with the old rule, that in a simple feu-charter or a feu-contract, containing nothing but the ordinary feudal obligations, without any express obligation of a personal nature against the feuar and his heirs and successors, the transference of the feu-right puts an end to the obligation of the vassal."—MOIR. But, in the absence of special stipulations, "a vassal is by the feu-contract liable to the superior for the feu-duties, and remains so even after he has sold the land, until the new purchaser shall be received by the superior;" *Wallace v. Ferguson*, 1739, M. 4195 (Kilkeran); *Hyslop v. Shaw*, March 13, 1863, 1 Macph. 535. Now, by 37 & 38 Vict. c. 94, § 4 (2), this liability only subsists "until notice of the change of ownership of the feu shall have been given to the superior."

are called casualties.(g) The casualties proper to a ward-holding, while that tenure subsisted, were ward, recognition, and marriage. The casualty of ward is that whereby the superior was entitled to the full rent of the ward-lands after the vassal's death, during the heir's minority, because the heir, in that period, was incapable of performing military service. This casualty was not known in the feudal law, which allowed the minor to serve by a substitute (Lib. 2, *feud. t. 26, § 4, vers. si. minori, § 5*); but it was received by us as early as the reign of Malcolm Mackenneth. And at first it comprehended the office of tutor-of-law to the heir, the remains of which continued till the reign of James VI.; Craig, 394, § 13, Skene, *voce Varda*.

3. The right arising to the superior from this casualty (7, 8) could not be hurt by any debt or deed of the vassal, not consented to by the superior. But (1) if the superior was charged by an adjudging creditor of his vassal to enter him, in consequence of 1469, c. 37, the ward falling thereafter, by the death of the vassal and the minority of the heir, was burdened with the adjudger's debt. (2) By 1457, c. 71, the ward-vassals, holding of the Crown, were allowed to sub-set their lands in feu-holding; and the feuars were secured against the ward of their immediate superiors, on payment to the Crown of the yearly feu-duty contained in their charters, while the ward continued. Under colour of this Act, the power of sub-feuing was assumed by the vassals of subject-superiors. But these were prohibited to sub-feu without the consent of the superior, by 1606, c. 12; and the prohibition is extended to the Crown's vassals by 1633, c. 16.

4. Ward was burdened with the charge of upholding the houses, inclosures, &c., in good condition during the heir's minority, and with an alimony to the heir if he had no

Burdens attending it:

Either temporary,

or perpetual.

(5, 6, 9, and iv. 4. 4)

(g) "A superior may also restrict his right to the casualties, or even renounce them altogether; and this renunciation has been found in *Nay-smith v. Storey*, 1748, M. 5723, to be effectual against singular successors in the superiority, though it did not enter the record."—MOIR.

By the Conveyancing Act, 1874, § 15, such casualties are rendered redeemable, and by § 23 no casualties can be stipulated for depending upon uncertain events.

separate means of subsistence; 1491, c. 25; 1535, c. 15. It was also affected with the terce due to the vassal's widow, and wholly excluded by the courtesy belonging to the surviving husband of the last female vassal, for these, being the provisions of law, were effectual without the superior's consent. It was sometimes restricted, by the investiture, to a certain sum to be paid annually by the minor heir, in place of the full rents. This was called taxed ward, and the other simple ward. The taxed duties were *debita fundi*. Ward regularly expired at the heir's age of twenty-one years, if a male; in females, it lasted only till fourteen, which was the age at which women were marriageable by our old law; R. M., l. 2, c. 48, § 1, Skene, *voce Varda*. In the case of co-heiresses, the ward determined at the eldest's age of fourteen, for heirs-portioners are proprietors *pro indiviso*, and so each of them is vassal in every part of the ward-lands.

Taxed ward.  
How ward  
expired.  
  
Recognition,  
(10-14)

5. Recognition was not simply a casualty, but a total forfeiture of the ward-lands, arising to the superior from the alienation by the vassal of more than the half thereof to a stranger without the superior's consent. By the feudal customs, it was only the part aliened which recognosced; Lib. 2, *feud.*, t. 38. It was originally introduced that the superior might not, by the vassal's alienation of his lands, lose the benefit of his services; *ib.*, l. 2, t. 52, § 1. It took place in all ward-holdings, even taxed; but in no other holding without an express clause in the charter. Legal alienations by adjudication drew no forfeiture after them: but all voluntary deeds whereby the lands were either sold or burdened, did infer it, as wadsets or rights of annualrent, but not rights of warrandice, because these are not present deeds of alienation. A right of annualrent, though granted over the whole ward-lands, inferred no recognition, if the sum thereby secured did not exceed the half of their value; nor an improper wadset, when the back tack-duty was not above the half of the yearly rents; *Hay v. Muir's Crs.*, July 7, 1681, M. 6500. Where there was no right effectually aliened, *e.g.*, if the charter or seisin were intrinsically null, recognition was not incurred.

was inferred  
by all volun-  
tary aliena-  
tions

6. An action for declaring recognition to have fallen of the vassal might have been brought even against a minor on deeds of alienation granted by his ancestor; i. 7, 25. But a vassal whose lands were subject to a right of redemption in favour of another, though he might by alienation forfeit the interest which he himself had in the subject, could not hurt the reverser's right: nor could deeds granted by a vassal inhibited, posterior to the inhibition, hurt the right of the creditor-inhibitor; 1686, c. 15. All were deemed strangers to the vassal but those who were *alioqui successuri*, i.e., those who, if they had survived him, must necessarily have succeeded to him, though there had been no disposition: recognition was therefore incurred by the vassal's alienation to his brother, though he was at that time next in succession, because the vassal might have afterwards had heirs of his own body; *Lord Hatton v. E. of Northesk*, July 29, 1672, M. 13,384; and by a wife's alienation to her husband; *Sir Ja. Hall v. Craw*, Jan. 13, 1725, M. 13,395.

7. A purchaser buying from a ward-vassal the smallest part of his lands was not secure without the superior's confirmation; for if the vassal should have afterwards sold what with the first purchase exceeded the half, both the first and last alienations, and all likewise that remained unsold, recognised to the superior. The superior's confirmation of an infertment, after disposing the major part, though it secured the right confirmed against the effect of the prior alienations, might be brought *in computo* with subsequent ones, so as to make the rest of the ward-lands recognise; *King's Adv. v. Cra. of Cromarty*, 1683, M. 6467. But a charter of *novodamus* to the vassal implied a confirmation of all prior deeds of alienation; and consequently hindered them from being conjoined with alienations made after the *novodamus*, so as to infer recognition; *ibid.*

8. Marriage or *maritagium* was that casualty by which the ward-superior was entitled to receive from the heir of his former vassal, after the age of puberty, a certain sum as the value (avail) of his tocher: in some cases the single avail was due; in others the double. This casualty is nowhere mentioned in the feudal customs; but we have received it as

(11, 15, 16)

to a stranger.

The superior's consent secures against it.

Casualty of marriage.

(18, 19, 23)

Single and double avail.

far back as the books of the Majesty; L. 2, c. 48. It obtained only in ward-holdings, unless where there was a special clause in the charter importing it. In some charters, most commonly in those where the ward was taxed, the casualty of marriage was also taxed to a liquid sum, which in that case<sup>(h)</sup> was *debitum fundi*, being of the same nature with the taxed ward-duties.

Single avail,  
when due;

(18, 19)

9. This casualty took its rise chiefly from the right that the superior was understood to have over the person as well as estate of the minor heir; Q. Att. c. 93, § 2; anciently, therefore, it affected only minor heirs who after puberty refused to marry upon the superior's requisition; but afterwards the single avail became due though the heir had been major at the death of his ancestor, and he himself had died, neither married nor required by the superior to marry; *Campbell v. M'Naughton*, Jan. 3, 1677, M. 8535. In the case of heirs-portioners only one marriage was due, because heirs-portioners enjoy the estate *pro indiviso*, as if they were but one person, though the contrary practice obtained in Sir Th. Hope's time; Min. Pr., 47, 48. Marriage could not possibly fall where the heir was married before the ancestor's death, nor where he had died before puberty. The superior's express consent to the heir's marriage was considered as a renunciation of the casualty; *Campbell*, M. 8539.

how esti-  
mated.

(20, 21)

10. In estimating the avail of marriage, the precise sum got in tocher was not considered, but what the heir might from his fortune reasonably expect. The Court of Session, *anno* 1674, fixed the modification of the single avail to three years' free rent of the vassal's estate; *Mowbray v. Arbuthnot*, 1674, M. 8532; afterwards they brought it down to two years; *Baird v. Morison*, Nov. 1701, M. 8545. The double avail was due where the superior, having offered a wife to the heir who was in all respects his equal, the heir not only refused the woman offered, but married with another; Q. Att. c. 91, § 2, and c. 53. At first the double avail was estimated at two single avails; but it is generally thought that, if the quantum of it had been brought into dispute in later times, it would

Double avail,  
when due;

how esti-  
mated.

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(h) In all cases; Inst., § 23.

have been reduced to three years' free rent of the estate belonging to the vassal. And in the estimation of either of the avails, not the ward-lands only, but all the other free estate of the vassal, was brought *in computo*, both heritable and moveable (*Somervel v. Gordon*, June 19, 1630, M. 8527), as it stood at the period when the heir first became marriageable.

11. Where a vassal held different ward-fees of different superiors, the marriage was due only to one superior, because the heir could not be married but once. In such case, the superior from whom the vassal's ancestors in blood had got the first feudal grant was entitled to the casualty, as eldest superior; Q. Att. c. 94; since he ought not to be cut out of his right by the vassal's afterwards acquiring ward-lands from another; but the Sovereign, who is the fountain of feudal rights, was always considered as the eldest superior, though the grant by the Crown to the ancestor of the vassal, whose marriage falls, should have been posterior to the rights of the vassal's other ward-holdings. It was enacted in favour of the Crown vassals, who should get their holdings changed from ward to feu or blanch, that they should be exempted from the marriage that might be claimed from them by other superiors, in the same manner as if the lands, whose holding was changed, had still continued to be holden ward; 1661, c. 58.

12. By the late statute, 20 Geo. II., for abolishing ward-holdings, the tenure of the lands holden ward of the Crown is turned into blanch, for payment of one penny Scots yearly, *si petatur tantum*; and the tenure of those holden of subjects, into feu, for payment of such yearly feu-duty in money, victual, or cattle, in place of all services, as shall be fixed by the Court of Session. The following rules have accordingly been settled, by Act S., Feb. 8, 1749. In lands that are held simply ward of a subject, one per cent. of the rent is to be paid as a yearly feu-duty on account of the marriage, and one per cent. as the value of the other casualties consequent upon ward-holding. Where the vassal holds other lands ward of the King, he is not liable in any feu-duty on account of the marriage. In lands holden taxed ward of a subject, two per

Marriage was due only to the eldest superior.

(22)

The King always the eldest.

Ward-fees abolished, whether holding of the Crown or of a subject.

(24)

or of the  
Prince.

cent. of the sum taxed by the charter is to be paid yearly as the value of all the casualties, whether the vassal holds other lands ward of his Majesty or not. A doubt having arisen whether the principality lands were included in this statute, and in what manner the vassals holding of the Prince were to be received, an Act passed, 25 Geo. II., c. 20, giving to the King the same powers that had been formerly exercised by the Kings of Scotland over the lands of the principality when there was no prince; in consequence of which, his Majesty, by a warrant under the Privy Seal, Jan. 1753, signified his pleasure that all lands formerly holden ward of the Prince should for the future be holden blanch.

Irritancy of  
feus ob non  
solutum  
canonem.

(26, 27)

13. The only casualty, or rather forfeiture, proper to feu-holdings, is the loss or tinsel of the feu-right, by the neglect of payment of the feu-duty for two full years. The Act which establishes this irritancy<sup>(i)</sup> (1597, c. 246) declares that all feuars so failing in payment shall lose their feu, in the same manner as if there had been an irritant clause in the right: yet subsequent practice has made a distinction; where there is no conventional irritancy, the vassal is allowed to purge the legal irritancy at the bar; that is, he may prevent the forfeiture, by making payment before sentence; but where the legal irritancy is fortified by a conventional, he is not allowed to purge, unless where he can give a good reason for the delay of payment, *L. Wedderburn v. Wardlaw*, Feb. 13, 1666, 2 B. S. 238; or where the irritant clause has been doubtfully expressed, *E. Mar v. Fraser*, Feb. 18, 1680, M. 7184.<sup>(j)</sup>

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(i) This irritancy is not affected by the Conveyancing Act (1874); see note at end of this title.

(j) It has been said with regard to feus that "this distinction between legal and conventional irritancies no longer obtains;" *Tailors of Aberdeen v. Coutts*, 1 Rob. App. 316. But see *Stewart v. Watson*, July 20, 1864, 2 Macph. 1414, where this "essential distinction" between legal and conventional irritancy was held, in regard at least to leases, to be completely established. A superior who betakes himself to this remedy cannot also claim arrears of feu-duties; *Macvicar v. Cochrane*, 1749, M. 4180; *Mags. of Edinburgh v. Horsburgh*, May 16, 1834, 12 S. 593. An instance of the enforcement of the superior's right, where the vassal had neglected to purge the irritancy at the bar, and afterwards sought to

14. The casualties common to all holdings are non-entry, (29, 30) relief, liverent escheat, disclamation, and purpresture. Non-entry is that casualty which arises to the superior out of the rents of the feudal subject, through the heir's neglecting to renew the investiture after his ancestor's death.<sup>(k)</sup> By the written feudal law, the investiture was necessarily to be renewed upon every change, either of the superior or vassal, lib. 2, *feud.* t. 24 pr.; but our customs require no renovation upon the death of the superior. This casualty was introduced that the superior, while he was without a vassal, might be enabled to provide himself with a proper person to serve him; the heir, therefore, as soon as by entering he becomes capable of serving his superior, returns by our customs to the full enjoyment of his feu; though by the feudal usages (*ibid.*), if he neglected to renew the investiture for year and day, he lost his right for ever.

15. The superior is entitled to this casualty, not only (30) where the heir has not obtained himself infeft, but where his retour is set aside upon nullities (*E. Nihsdale v. L. Westraw*, Feb. 29, 1628, M. 5192); for a null retour is equal to none. The heir, from the death of the ancestor, till he be cited by the superior in a process of general declarator of non-entry, loses only the retoured duties of his lands; and he forfeits these though his delay should not argue any contempt of the superior; because the casualty is considered to fall as a condition implied in the feudal right, and not as a penalty of transgression; but where the delay proceeds not from the heir, but from the superior, nothing is forfeited, not even the retoured duties, 1474, c. 58; *Chalmers v. Potter*, (40, 45)

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reduce the proceedings, tendering payment of arrears and interest, will be found in *Ballenden v. D. of Argyll*, 1792, M. 7252, Bell's 8vo Ca. 157. See b. I. t. iii. § 12, note, as to sheriff's jurisdiction.

(k) And "when the vassal last entered has resigned, and the resignatory not yet entered;" Inst. l. c., and see below, § 20.

Since 1st Oct., 1874, no lands are to be deemed in non-entry; but a superior, who but for that Act would have been entitled to sue an action of declarator and non-entry, may bring an action of declarator and for payment of any casualty due. See Conveyancing Act (1874), § 4, subsection 4, and note.

June 29, 1745, M. 9330, 15,091, Elch. "Non-entry," 3; 1 Pat. App. 404.

Retoured  
duties.

(31-36)

Valuation.

Old and new  
extents.

16. For understanding the nature of retoured duties<sup>(l)</sup> it must be known that there was anciently a general valuation of all the lands in Scotland, designed both for regulating the proportion of public subsidies, and for ascertaining the quantity of non-entry and relief duties payable to the superior; which appears, by a contract betwixt King Robert Bruce and his subjects, *anno* 1327, preserved in the Advocates' Library, to have been settled at least as far back as the reign of Alexander III.<sup>(m)</sup> This valuation became in the course of time, by the improvement of agriculture, and perhaps also by the heightening of the nominal value of our money, from the reign of Robert I. downwards to that of James III., much too low a standard for the superior's casualties: wherefore, in all services of heirs the inquest came at last to take proof likewise of the present value of the lands contained in the brief (*quantum nunc valent*), in order to fix these casualties. The first was called the old, and the other the new extent. Though both extents were ordained, by 1474, c. 56, to be specified in all retours made to the Chancery upon brieves of inquest, yet by the appellation of retoured duties, in a question concerning casualties, the new extent is always understood. The old extent continued the rule for levying public subsidies (see 1633, c. 1) till a tax was imposed by new proportions by several Acts made during the usurpation. By two Acts of Cromwell's Parliament, held at Westminster (1656, c. 14 and 24), imposing taxations on Scotland, the rates laid upon the several counties are precisely fixed. The subsidy granted by the Act of Convention 1667 was levied on the several counties nearly in the same proportions that were fixed by the usurper in 1656; and the sums to which each county was subjected were subdivided among the individual landholders

(l) See for an account of the nature of retoured duties, and of the old and new extent, Lord Kames's "Historical Law Tracts," Tract 14.

(m) Lord Hailes (Annals, vol. i. p. 202, 8vo edition, Edinburgh, 1797) points out evidence of a valuation prior to the reign of this Prince.

in that county, according to the valuations already settled, or that should be settled, by the commissioners appointed to carry that Act into execution. The rent fixed by these valuations is commonly called the valued rent, according to which the land-tax, and most of the other public burdens, have been levied since that time.<sup>(n)</sup>

17. In feu-holdings the duty is retoured as the rent because the feu-duty is presumed to be, and truly was at first, the rent. The superior, therefore, of a feu-holding gets no non-entry before citation in the general declarator; for he would have been entitled to the yearly feu-duty though the fee had been full, i.e., though there had been a vassal infeft in the lands. The superior of teinds gets the fifth part of the retoured duty as non-entry, because the law considers teinds to be worth a fifth part of the rent (ii. 10, § 10). In rights of annualrent which are holden of the granter, the annualrenter becomes his debtor's vassal; and, as the annualrent contained in the right is retoured *valere seipsum*, the heir of the creditor, while he continued in non-entry, lost the whole interest of the debt due to him. But by 1690, c. 42, annualrents are only to be retoured to the blanch, or other duty contained in the right. As this Act does not extend to the non-entry, after citation in the action of declarator, care is generally taken, in rights of annualrent, to release the creditor from all non-entries, by a special clause.

18. It is because the retoured duty is the presumed rent that the non-entry is governed by it. If therefore no retour of the lands in non-entry can be produced, nor any evidence brought of the retoured duty, the superior is entitled to the real, or at least to the valued rent, even before citation. But if the lands which have been retoured shall be sold out in parcels, the non-entry of each parcel will be restricted to that particular proportion of the retoured duties that such parcel bears to the whole lands; *Ker v. Scott*, Feb.

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(n) Most public burdens are now levied according to the Valuation Roll, annually prepared under 17 & 18 Vict. c. 91, 20 & 21 Vict. c. 58, and 20 & 31 Vict. c. 80.

and in lands  
that formerly  
held ward of  
the Crown.

5, 1623, M. 9290. In lands formerly holden ward of the King, the heir, in place of the retoured duties, is, by the Act 20 Geo. II. c. 50, subjected only to the annual payment of one per cent. of the valued rent; which valuation therefore, as well as the old and new extents, is to be set forth in the retour.

Non-entry  
duties after  
citation

(40)

are properly  
penal.

(39)

Non-entry  
subsequent to  
ward.

(42)

What non-  
entry duties  
are *debita*  
*fundi*.

19. The heir, after he is cited by the superior in the action of general declarator, is subjected to the full rents till his entry, because his neglect is less excusable after citation. The decree of declarator proceeding on this action entitles the superior to the possession, and gives him right to the rents downward from the citation. As this sort of non-entry is properly penal, our law has always restricted it to the retoured duties, if the heir had a probable reason for declining to enter, *Douglas v. Carlyle*, 1675, M. 9138; or if he lay under any incapacity, *Lord Melvil v. Bruce*, July 24, 1677, M. 9320; or had ground to believe that he held of another superior, *Maitland v. Brand*, Jan. 22, 1706, M. 9329.(o) While ward-holdings subsisted, the wardator, who had been in possession of the lands in virtue of the ward, might, even without declarator, continue his possession after the expiration of the ward, till the heir's entry (which was called non-entry subsequent to the ward); but if he had not attained possession, he was in the common case of other superiors as to the non-entry. The retoured duties due before citation are *debita fundi*, which the superior as creditor may recover by a poinding of the ground; but the right which he has to the full duties that fall after citation does not accrue to him as creditor, but as *interim dominus* of the rents; in which character he can make the rents effectual by a petitory action against tenants and intromitters, improperly called a special declarator.(p)

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(o) *Robin v. Drummond*, June 13, 1823, 2 S. 359; *Wallace v. Eglinton*, March 2, 1836, 14 S. 599.

So the Courts do not feel bound, under the Conveyancing Act, in an action of declarator for payment, to award the rents from the date of citation; *Ferrier's Trs. v. Bayley*, May 26, 1877, 4 Ret. 738.

(p) *Coltart v. Tait*, 1782, M. 9313. See *Mackintosh v. Tytler*, 20 May, 1870, 8 Macph. 772.

20. In boroughs, each particular burgess holds of the King the special subject contained in his infeftment; and therefore, by the general rule, non-entry ought to take place against them as it does against other vassals: yet it is certain that non-entry does not obtain in burgage-holdings (Hope's Min. Pr., 96), because the incorporation of inhabitants holds the borough itself (i.e., the whole incorporated subjects) of the King; and there can be no non-entry due in lands granted to communities, because there the vassal never dies: this covers the right of particulars from non-entry; for if non-entry be excluded with regard to the whole, it cannot obtain with regard to any part. Neither can non-entry fall when the fee is full by infeftments of property, either flowing from or confirmed by the superior; or even by the reserved liferent of the fiar; Stair, iv. 8, § 7.(q) It is also excluded as to a third of the lands by the terce during the widow's life, and as to the whole of them by the courtesy during the life of the husband. But it is not excluded by a precept of seisin granted to the heir, till seisin be taken thereon. Non-entry falls by the vassal's resigning his fee to the superior in favour of a third party; and it continues till seisin be taken by the resignatary; Stair, iii. 2, § 12.(r) A superior infeft, who is charged by the heir to enter him, is barred, *personali exceptione*, from the non-entry duties, so long as he refuses to receive him. Where the superior is not entered, and so is not in a capacity to receive the heir, and yet refuses to make up his titles upon a charge, he forfeits the non-entry duties during his life, 1474, c. 58.(s)

In what cases  
non-entry is  
not due.

(43-45)

(30)

(q) But where a superior confirmed the right of a creditor in a heritable security, reserving his right to an entry on the death of the debtor, the lands were held to be in non-entry on the death of the debtor; *Darrock v. Ranken*, June 14, 1855, 17 D. 935.

(r) In such a case, or where the vassal dies after disposing the feu to a stranger, it seems not necessary, though it is usual, in the declarator of non-entry to call the last vassal's heir; *Mags. of Dundee v. Kid*, June 26, 1829, 7 S. 801; *Mackenzie v. Mackenzie*, July 10, 1838, 16 S. 1326.

(s) Various Acts, now consolidated in 31 & 32 Vict. c. 101, § 104 *et seq.*, provide a method of forcing an entry by temporary or permanent

Bygone non-entries, how excluded.

(40)

21. Three seisins proceeding upon retours or on precepts granted by the superior to three consecutive heirs, presume that all preceding non-entries are satisfied. A charter of *novodamus* imports a discharge of all casualties incurred prior to its date; *Erskine v. Hamilton*, Feb. 12, 1713, M. 6515. Entry by the heir on a precept voluntarily granted by the superior, reciting that the ancestor died seised in the lands, imports a discharge of all bygone non-entries incurred before the death of that ancestor, Stair, iv. 8, § 7; but charters or precepts by the superior, upon charges directed against him, do not exclude his claim for past duties; since these, being granted in obedience to the law, imply a reservation of former claims.<sup>(t)</sup>

Relief;

(47, 48)

22. Relief is that casualty which entitles the superior to an acknowledgment or consideration from the heir for receiving him as vassal. It is called relief because, by the entry of the heir, his fee is relieved out of the hands of the superior. There is no mention of this casualty in the books of the feus; but by our ancient feudal customs not only proper vassals, by whatever tenure they held, were liable in relief, R. M., l. 2, c. 71, but even naked possessors of lands paid to their masters upon their entry a duty much resembling it, Q. Att. c. 23; Skene, *voce Herezelda*; so that it might be thought that feu-holding, when that tenure came to be introduced, ought also to have been subject to it: nevertheless, relief was found not due in feu-holdings flowing from subjects, unless where it was expressed in the charter by a special clause for doubling the feu-duty at the entry of

when due in feu-holdings;

forfeiture, or relinquishment, of the superiority under the sanction of the Court in cases where the superior's title is incomplete, so that the procedure by declarator of tinsel of the superiority, under 1474, c. 58, is virtually superseded.

(t) "But seisin on such charter or precept will bar non-entry for the future, because by the seisin the fee is full;" Inst., l. c. The granting of a charter by progress implies a discharge of all bygone duties and casualties, unless expressly reserved, *Tailors of Glasgow v. Blackie*, June 11, 1851, 13 D. 1073; even in the case of Crown charters, *Lord Advocate v. Lord Rollo*, July 19, 1872, 10 Macph. 1024. The statutory entry implied in infestment will have no such effect; Conveyancing Act (1874), 37 & 38 Vict. c. 94, § 4 (2) and (3).

an heir (*E. Dundonald v. Barr*, Nov. 24, 1736, M. 13,579): (u) but in feu-rights holden of the Crown our ancient law is observed; for the precept issuing from the Chancery for infesting the heir directs the sheriff to take security for the relief, though there should be no such clause in the charter. The superior can recover this casualty either by a pointing of the ground, as a *debitum fundi*, or by a personal action against the heir, who, if the lands hold of the Crown, is sub-jected by his taking a precept of seisin from the Chancery, though he should not infest himself upon it; *L. Lauriston v. Sheriff of the Merns*, March 12, 1628, M. 10,163, 13,579. In blanch and feu-holdings, where this casualty is expressly stipulated, a year's blanch or feu-duty is due in name of relief, beside the current year's duty payable in name of blanch or feu-farm. In ward-holdings the superior, if he was in possession by the ward, continued another year in possession on account of the relief; otherwise he was entitled only to the retoured duty. No composition or abatement of the relief-duties can be given to the Crown's vassals, 1587, c. 73.(x)

(50)

it is *debitum fundi*.

How estimated.

(49)

(u) The author, in the Inst., l. c., sees strong reasons to doubt this, and it is now generally held that relief is due in all feu-holdings; *Menzies's Lect.* 605; *Bell's Pr.* 716.

(x) "Where a purchaser or singular successor applies for an entry from the superior he is liable in payment of a composition, i.e., a year's actual rent of the subjects, under deduction of annual and public burdens and repairs, and of a fifth for teind when the superior is not proprietor of the teinds;" also of the feu-duty and of all annual burdens imposed with the superior's consent. "If the original vassal has raised the value of the ground by the erection of houses, a purchaser from him must pay to the superior the full increased yearly value of the lands; *Aitchison v. Hopkirk*, 1775, M. 15,068; *Anderson v. Marshall*, Nov. 30, 1824, 3 S. 334. But where the lands have been *sub-feued* at their fair annual value, the superior can only demand from the purchaser of the intermediate estate one year's sub-feu-duties, the actual yearly value of the estate to the person who applies for the entry; *Cockburn Ross v. Heriot's Hospital*, June 6, 1815, F.C., aff. July 24, 1820, 6 Pat. App. 640. It is not decided whether casualties falling due to the vassal in the year of entry are included in the composition, but the interest on a grassum is included; *Campbell v. Hamilton*, June 28, 1832, 10 S. 734; *Lord Blantyre v. Dunn*, July 1, 1858, 20 D. 1188."—MOIR. See below, tit. vii. §§ 2, 3.

Escheat.

(53)

23. Escheat (from *escheoir*, to happen or fall) anciently signified any casualty or forfeiture, by which a right fell from the proprietor, or accrued to another (Q. Att. c. 48); but it has been since restricted to that special forfeiture which falls through a person's being denounced rebel. It is either single or liferent. Single escheat, though it does not accrue to the superior, must be explained in this place, because of its coincidence with liferent.

Single escheat.

(54, 55)

Letters of  
horning;on what  
number of  
days they  
proceed;

(4, 3, 10)

24. After a debt is constituted, either by a formal decree or by registration of the ground of debt (which, to the special effect of execution, is in law accounted a decree), the creditor may obtain letters of horning, issuing from the signet, commanding messengers to charge the debtor to pay or perform his obligation within a day certain. Where horning proceeds on a formal decree of the Session, the time indulged by law to the debtor is fifteen days;(y) if upon a decree of the commission of teinds, it is ten, 1633, c. 8.(z) By our former law, horning on a charge of ten days followed upon the decrees of all inferior judges, 1593, c. 177; 1606, c. 10; but by our present practice on fifteen, which is probably owing to a misinterpretation of 1612, c. 7. Yet horning still proceeds on admiral decrees upon ten days, according to the directions of 1609, c. 15.(a) Where it proceeds on a registered obligation, which specifies the number of days, that number must be the rule; and if no precise number be mentioned, the charge must be given on fifteen days, which is the term of law,(b) unless where special statute interposes; as in bills, upon which the debtor may be charged on six days, 1681, c. 20.(c)

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(y) Fourteen days; 13 & 14 Vict. c. 36, § 21.

(z) On exchequer decrees six days; 19 & 20 Vict. c. 56.

(a) See above, i. 3, 18, note.

(b) The ordinary short clause of consent to registration for execution, unless specially qualified, imports in all deeds consent to execution on six days' charge; 31 & 32 Vict. c. 101, § 138.

(c) The form of imprisonment for civil debt here described is still competent, but a creditor cannot recover from his debtor the expense of using it. The Personal Diligence Act (1 & 2 Vict. c. 114) introduced a simpler form. Every extract decree, whether pronounced by a court, or of registration, now contains a warrant to charge under pain of imprisonment

25. The messenger must execute these letters (and indeed all summonses) against the debtor, either personally or at his dwelling-house; (d) and if he get no access to the house, he must strike six knocks at the gate, and thereafter affix to it a copy of his execution; 1540, c. 75. If payment be not made within the days mentioned in the horning, the messenger, after proclaiming three oyesses at the market-cross of the head borough of the debtor's domicile, and reading the letters there, blows three blasts with a horn; by which the debtor is understood to be proclaimed rebel to the King, for contempt of his authority; after which, he must affix a copy of the execution to the market-cross. This is called the publication of the diligence, or a denunciation at the horn. Where the debtor is not in Scotland, he must be charged on sixty days, and denounced at the market-cross of Edinburgh, and pier and shore of Leith.

their execution;

(53)

form of denunciation;

(56)

26. Denunciation, if registered within fifteen days, either in the sheriff's books (1579, c. 75), or in the general register (1600, c. 13), drew after it the rebel's single escheat, i.e., the forfeiture of his moveables to the Crown. So severe a penalty, with the character of rebel affixed to denunciation on civil debts, was probably owing to this, that anciently letters of horning were not granted but to enforce the performance of facts in one's own power (Books S. March 1, 1563-4); and when afterwards they came to be issued upon liquid debts (1584, c. 139), the Legislature neglected to soften the penalty: insomuch that those who were denounced even for a civil cause might be put to death with impunity, till 1612, c. 3. Persons denounced rebels have not a *persona standi in*

its consequences.

(58, 59)

(60)

and poinding. Registration of the decree and warrant in the General or Particular Register of Hornings within year and day after the expiry of the days of charge has the effect of denunciation under the other form, and also accumulates principal and interest. The creditor then applies by minute for warrant to imprison, which, if the proceedings are regular, is granted as of course, by the sheriff-clerk or clerk of the Bills writing, signing, and dating, the words "*fiat ut petitur*" on the minute.

(d) Not at his counting-house or place of business, *Fraser v. Lancaster*, &c., 1795, M. 4706; but the counting-house of a partnership is the proper place for citing the company, *Wordie v. M'Donald*, Dec. 15, 1831, 10 S. 142.

*judicio*: they can neither sue nor defend in any action; *Macombie v. Duguid*, 1750, M. 4775. But this incapacity, being unfavourable, is personal to the rebel, and cannot be pleaded against his assignee.

Denunciation  
in criminal  
causes.

(57)

S. escheat  
may fall  
without  
denunciation.

Escheat upon  
debts now  
discharged.

(59)

Subjects fall-  
ing by S.  
escheat.

(61)

Bonds bearing  
interest fall  
not under it;

but tacks do.

27. Persons cited to the Court of Justiciary may be also denounced rebels, either for appearing there with too great a number of attendants, or, if by failing to appear, they are declared fugitives from the law. In the first case, the denunciation must be made at the head borough of the shire where the court is held, and may be registered either in the books of the shire of the rebel's domicile or in the books of adjournal of the Justiciary (1584, c. 140); and, in the last case, it is effectual if used within six days after the sentence of fugitation at the market-cross of Edinburgh, 1592, c. 126. Single escheat falls without denunciation, upon sentence of death pronounced in any criminal trial; and, by special statute, upon one's being convicted of certain crimes, though not capital, as perjury and bigamy (1551, c. 19), deforcement and breach of arrestment (1581, c. 118), and usury, 1597, c. 247.(e) By the late Act, abolishing ward-holdings,(f) the casualties both of single and liferent escheat are discharged when proceeding upon denunciation for civil debts; but they still continue when they arise from criminal causes. All moveables belonging to the rebel at the time of his rebellion (whether proceeding upon denunciation or sentence in a criminal trial), and all that shall be afterwards acquired by him, until relaxation, fall under single escheat. Bonds bearing interest, because they continue heritable *quoad fiscum* by 1661, c. 32, fall not under it,(g) nor such fruits of heritable subjects as become due after the term next ensuing the rebellion, these being reserved for the liferent escheat. Tacks or leases, though they are heritable as to

(e) The usury laws are repealed; and in convictions for perjury, bigamy, deforcement, and breach of arrestment, it is not usual to inflict this penalty.

(f) 20 Geo. II. c. 50.

(g) And for the same reason heritable securities do not fall under it, though they may form moveable estate under the Consolidation Act, 1868, § 117.

succession (ii. 2, § 2), fall under it, unless they be liferent tacks (1617, c. 15); and even liferent-tacks, and all other liferent rights, in the person of an assignee, fall as single escheat; *infra*, § 32.

28. Our former law allowed the treasury to levy the escheat goods summarily (1579, c. 75) without hearing the person denounced upon any objections that might have been competent to him; but by the later practice the King never retains the right of escheat to himself, but makes it over to a donatary, whose gift is not perfected till, upon an action of general declarator, it be declared that the rebel's escheat has fallen to the Crown by his denunciation, and that the right of it is now transferred to the pursuer by the gift in his favour; *Borthwick v. Arbuthnott*, Nov. 8, 1710, M. 3655. (62)

Every creditor, therefore, of the rebel, whose debt was contracted before rebellion, and who has used diligence before declarator, is preferable to the donatary, insomuch that an arrestment used before declarator, though not complete by a forthcoming, is effectual against him; *Glen v. Hume*, Feb. 19, 1667, M. 3645. But the escheat cannot be affected by any debt contracted, nor by any voluntary deed of the rebel, after rebellion, though such deed has been granted in security of a debt prior thereto, since otherwise the rebel would have it in his power to evacuate the escheat. Where the rebel was, before rebellion, obliged to grant a right to his creditor, the right granted after rebellion, in consequence of the prior obligation, is not considered as voluntary, because he might have been compelled to it. Voluntary payment by the rebel, before declarator, of debts contracted before the rebellion, is, from the favour of commerce, sustained against the donatary; *Veitch v. Pallat*, Dec. 10, 1673, M. 8367. The right of escheat is (*h*) in every case burdened with the debt of that creditor on whose horning the escheat fell, 1592, c. 143; but the Crown's power over it is not restrained in favour of any other creditor; 1551, c. 7; 1579, c. 75. (75-77)

What debts  
are a burden  
upon single  
escheat.

(58, 77)

29. The rebel, if he either pays the debt charged for, or Letters of relaxation.

(*h*) Was, till 1748.

(65)

suspends the diligence, may procure letters of relaxation from the horn; which, if published in the same place, and registered fifteen days thereafter in the same register with the denunciation (1579, c. 75), have the effect to restore him to his former state; but they have no retrospect as to the moveables already fallen under escheat, without a special clause for that purpose.

Liferent  
escheat.

(66)

30. The rebel, if he continues unrelaxed for year and day after rebellion, is construed to be civilly dead; and therefore, where he holds any feudal right, his superiors, as being without a vassal, are entitled, each of them, to the rents of such of the lands belonging to the rebel as hold of himself, during all the days of the rebel's natural life, by the casualty of liferent-escheat; except where the denunciation proceeds upon treason or proper rebellion (1535, c. 32); in which last case the liferent falls to the King.

To whom this  
right falls.

(69)

31. The liferent-escheat of an apparent heir falls to the superior of the lands, as if the heir were entered; for his neglect ought to be neither profitable to himself nor hurtful to his superior. The liferent of a purchaser of lands not infeft cannot fall by this casualty; for till his right be completed by seisin he can have no superior. The rents, therefore, of such lands, while the rebel is unrelaxed, fall to the King, who, by the rebellion, has right to all the rebel's moveable estate that is not appropriated to liferent-escheat; (68) *Menzies v. Kennedy*, July 22, 1675, M. 3639. In feudal rights which require no seisin the liferent accrues to him who would have been superior in the right had it required seisin. By this rule the life-escheat of a widow having a right of terce, or a husband having a right of courtesy, falls to the superior of the lands liferented (*Maxwell v. L. Lochinvar* July 12, 1622, M. 3636); and the escheat of ministers' glebes and stipends to the King; and it would appear that by the same principle the liferent-escheat of a liferent-tack ought to fall to the proprietor of the ground from whom the tack flowed.

What is com-  
prehended  
under it.  
(70, 71)

32. It is that estate only to which the rebel has a proper right of liferent in his own person that falls under his life-

rent-escheat.(i) A liferent-infertment, therefore, or a liferent-tack, when assigned, falls not under the assignee's liferent-escheat, but his single; because the assignee has such right only during his cedent's life, not his own (ii. 9, § 24). Hence, if we shall suppose the liferent of the sub-vassal to fall first, and then that of the vassal, the sub-vassal's liferent, after it has accrued to the vassal, must make a part of the vassal's single escheat, and so goes to the King; because the vassal's right to the sub-vassal's liferent does not depend on his own life, but on that of the sub-vassal. But if the liferent-escheat of the vassal should fall first, and thereafter that of the sub-vassal, the sub-vassal's escheat must go as liferent to his mediate superior, who, by coming in the place of the immediate one, has the same right to the sub-vassal's liferent that such immediate superior would have had if he had not been disabled from taking it by his being year and day rebel; *Sibbald v. Lethentie*, Feb. 26, 1623, M. 3616; *Rule v. L. Billie*, July 24, 1632, M. 3624.

33. Though neither the superior nor his donatary can enter into possession, in consequence of this casualty, till decree of declarator, yet that decree, being truly declaratory, has a retrospect, and does not so properly confer a new right as declare the right formerly constituted to the superior by the civil death of his vassal. Hence, all charters or heritable bonds, though granted prior to the rebellion, and all adjudications, though led upon debts contracted before that period, are ineffectual against the liferent-escheat, unless seisin be taken thereon (*in cursu rebellionis*) within year and day of the granter's rebellion, after which he becomes *civiliter mortuus*; *Lord Al. Hay v. E. Glasgow*, Nov. 28, 1710, M. 3669.

It is constituted without declarator. (73, 78)

34. Here, as in single escheat, no debt contracted after rebellion can hurt the donatary, at what time soever the diligence thereupon, or the rights granted for its security, may have been completed; nor any voluntary right granted after

With what debts it is burdened.

Donatary's right not complete till declarator.

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(i) The fee remains in the rebel with the power of disposing of it, as, for example, by an entail; *Macrae v. Macrae*, Nov. 22, 1836, 15 S. 54, aff. June 27, 1839, M'L. & R. 646.

Rules of preference between gifts of liferent.

that period, though in security or satisfaction of prior debts. Though the superior's right be fully established by the lapse of year and day, yet it is the decree of declarator upon the gift which first vests that right in the donatary that before remained with the superior; see *Scot v. Langtown*, June 19, 1669, M. 5100; hence, in a competition between two donataries, the gift declared, though last in date, is preferable. Where neither of the donataries has obtained decree, he is preferred whose summons was first executed; *L. Renton v. L. Wedderburn*, Jan. 31, 1635, M. 5097. All other things being equal, priority in date is the rule of preference.

Difference between liferent-escheat and other casualties.

(79)

35. In other casualties, as ward, non-entry, recognition, &c., the superior is not obliged to acknowledge any right affecting the feu which is not either confirmed by himself or established by law; because, where the casualty arises from the genuine nature of the feudal grant, his right to it cannot be impaired by any fact of his vassal: but liferent-escheat is burdened with all rights granted before, and completed in the course of the rebellion, though not confirmed by the superior; because that casualty is not so natural to feudal rights as the others, and is only superinduced upon the feudal plan by our special customs.(k)

Simulate gifts of escheat.

(80)

36. Gifts, whether of single or liferent-escheat, when granted for the behoof of the rebel himself, are null, as being simulate, *i.e.*, intended for a cover to the rebel, against his creditors, 1572, c. 145. This statute presumes simulation, from the rebel's being suffered by the donatary to possess the escheat goods by himself or near relations; yet a gift may be taken without challenge directly to the rebel's son, if such son can prove himself creditor to his father; or to the wife or children of the rebel, from considerations of compassion, where the gift bears expressly to be for their alimony and subsistence; Bankton, iii. t. 3, § 28. A presumption of simulation also arises from the gifts being obtained by the rebel's interest; but this may, where the donatary is creditor, and has given back-bond to the Exchequer in favour of the rebel's other

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(k) See *Countess of Sutherland v. Crs. of Skelbo*, 1771, M. App. "Sup. and Vass.," 1.

creditors, be elided by his own oath; *Dickson v. McCulloch*, Dec. 12, 1673, M. 11,600. Not only second donataries, but the creditors of the rebel, may object simulation against a gift if their debts were contracted prior thereto; see *White v. Reid*, Jan. 10, 1712, M. 37, and the decisions there referred to; Fount. ii. 701, M. 37. The rebel himself may, after relaxation, be constituted donatary; but such gift is considered simply as an extinction of the casualty *confusione*, and cannot exclude creditors from the subject of the escheat.

**37.** *Disclamation* is that casualty whereby a vassal forfeits his whole feu to his superior, if he disowns or disclaims him without ground, as to any part of it, R. M., l. 2, c. 63, § 6, 9. *Purpresture* draws likewise a forfeiture of the whole feu after it, and is incurred by the vassal's encroaching upon any part of his superior's property, or attempting by building, inclosing, or otherwise to make it his own, R. M., l. 2, c. 74, § 1, 8; 1600, c. 5. In both these feudal delinquencies the least colour of excuse saves the vassal.

**38.** All grants from the Crown, whether charters, gifts of casualties, or others, proceed on signatures which pass the signet. When the King resided in Scotland, all signatures were subscribed by him; but on the accession of James VI. to the Crown of England, a cachet or seal was made, having the King's name engraved on it, in pursuance of an Act of the Privy Council, April 4, 1603, with which all signatures were to be afterwards sealed, that the Lords of Exchequer were empowered to pass; and these powers are transferred to the Court of Exchequer, which was established in Scotland after the union of the two kingdoms in 1707 (i. 3, § 17). Grants of higher consequence, as remissions of crimes, gifts proceeding upon forfeiture, and charters of *novodamus*, must have the King's sign-manual for their warrant.

**39.** If lands holding of the Crown were to be conveyed, the charter passed, before the union of the kingdoms in 1707, by the Great Seal of Scotland, and now by a seal substituted in place thereof by 1707, c. 7, § 24. Grants of church-dignities, during Episcopacy, passed also by the Great Seal; and the commissions to all the principal officers of the Crown, as Justice-Clerk, King's Advocate, Solicitor, &c., do so at

Privy Seal.

(84)

Quarter Seal.

(85)

The use of  
seals.

(86)

this day. The form of expediting charters under the Great Seal is distinctly set forth, Hope's Min. Pr. 86, 89.<sup>(1)</sup> All rights which subjects may transmit by simple assignation the King transmits by the Privy Seal; as gifts of moveables, or of casualties that require no seisin. The quarter-seal, otherwise called the Testimonial of the Great Seal, is appended to gifts of tutory, commissions of brieves issuing from the Chancery, and letters of presentation to lands holding of a subject, charters proceeding upon forfeiture, bastardy, or *ultimus hæres*. While the practice continued of writing charters and their precepts of seisin upon separate parchments, this seal was appended to precepts proceeding on such charters as had passed the Great Seal.

40. Seals are to royal grants what subscription is to rights derived from subjects, and give them authority: they serve also as a check to gifts procured (*subreptione vel obreptione*) by concealing the truth, or expressing a falsehood; for where this appears the gift may be stopped before passing the seals, though the signature should have been signed by the King. By 1672, c. 7, all rights passing under the Great or Privy Seal must be registered in the registers of the Great or Privy Seal *respectivè*, before appending the seal.

Expediting  
Crown  
Charters.

(1) Since the Crown Charters Act, 10 & 11 Vict. c. 51, now, along with amendments introduced in 1858, incorporated in the Titles to Land Consolidation Act, 31 & 32 Vict. c. 101, §§ 63-96, a simpler form of expediting Crown charters has been in use. A draft charter is lodged with the Presenter of Signatures along with the last Crown writ, retour, or decree of service, and all subsequent title-deeds, together with evidence of the valued rents, and an inventory of the titles. The draft is revised by the presenter, and the composition marked on the back. (The office of Presenter of Signatures has been abolished, and its duties, so far as they continue necessary, have been transferred to the Sheriff of Chancery by § 57 of the Conveyancing Act, 1874.) Objections to the revised draft are disposed of by the Lord Ordinary in Exchequer causes, and his judgment or that of the court of review is the warrant for the preparation of the writ in the office of the Director of Chancery, by whom, or his depute, every Crown writ is signed. Sealing is dispensed with, unless required by the receiver of the writ. The writ when signed, or signed and sealed, is recorded in "the Register of Crown Writs." Entries with the Crown may now be effected by short writs in a statutory form, engrossed on the conveyance from the previous vassal, instead of by

## NOTE ON THE SIMPLIFICATION OF TITLES TO LAND.

The simplification of titles to land has made rapid progress during the last forty years.

The ceremony which accompanied the investiture of vassals was designed to publish, and to preserve evidence of, the fact of a new feu having been created, or that an old one was acknowledged to belong to the heir or to a transferee, and that the last vassal was freed from the obligations in the charter. For the more perfect preservation of the evidence, registers were established, in which parties might record a narrative of what had been done. After a time, registration was made compulsory, and the registers declared open to the public. When this system had become tolerably complete, it was found that to require the recording of a ceremony, which was merely intended as a mode of publishing the terms of a holding, was to create an additional possibility of error, and that all that was really necessary for the purpose, either of preserving evidence of a transaction in land, or of securing its publication, was the registration of the deed itself, instead of the ceremony following upon it; and accordingly, by the statutes ending in the Consolidation Act of 1868, all ceremonies were rendered unnecessary if the deed was recorded in the proper register of sasines, with a warrant showing at whose instance and by whose authority the recording took place.

It will have been observed from the history of feus given in the text, how superiors gradually came to be obliged to receive as vassals the heirs of the original vassal, and then their creditors and their disponees, and how they came to be compellable to recognise them by either of the known methods of registration or confirmation dealt with in tit. vii. As the price of this acknowledgment, certain casualties came to be payable to the superior by the vassal's heir or disponee; but as these fell due at uncertain and unascertainable intervals, and were of uncertain amount, they were found to be so inconvenient that it became common to fix or tax the amount of casualties.

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charters. The consent of two Commissioners of Woods and Forests is required in order to obtain a Crown charter or writ of *novodamus*, which, when revised and engrossed as in the ordinary case, is lodged with the Queen's Remembrancer, and by him transmitted for the royal sign manual, and the signatures of two Lords of the Treasury. See below, t. vii. § 7.

Since 1874 it has been incompetent to grant feus with casualties uncertain in amount and payable at unascertainable intervals ; but parties may contract so as to make the *reddendum* of a fee vary in amount from time to time, provided the variation, whether in time or amount, be capable of ascertainment.

As regards old feus, either the superior or the vassal may have the casualties extinguished. As will be seen from the clauses of the Act, the extinction may be arranged by special bargain, or the vassal may make a single payment, varying with the nature and amount of the first casualty exigible, or the superior may, instead, require him to pay, as an additional feu-duty, 4 per cent. annually on the estimated amount of the redemption-money.

The general scope of this part of the Conveyancing Act of 1874 is, that no greater sums shall be exigible than under the old system, and that, notwithstanding the statutory entry implied in infeftment, the vassal shall not escape any payments formerly exigible. These objects, however, have not been perfectly attained ; see *Ferrier's Trs. v. Bayley*, May 26, 1877, 4 R. 738 ; and *Rosemore's Trs. v. Brownlie*, Nov. 23, 1877, 5 R. 201.

After the law had been so altered that a superior could be compelled to receive a new vassal, whether an heir or a disponee, the application of the vassal to the superior for an entry became a mere cumbrous ceremony, causing expense and often complicating titles ; and accordingly it has been enacted that infeftment duly recorded, or its equivalent, shall imply entry, and it has been made unnecessary in any circumstances to apply to superiors for, and unlawful in future for superiors to grant, any charter, precept, or other writ, by progress, implying recognition of a new vassal, excepting always that nothing shall prevent the granting of "charters of novodamus, or precepts or writs from Chancery, or of clare constat, or writs of acknowledgment."

As has been already mentioned, the superior can enforce payment of the sums exigible whether under old or under new feus, either by the former methods or by the new ones substituted for them.

The fourth section of the Conveyancing Act of 1874 is the leading one on this branch of the law ; see Appendix.

Besides the cases just cited, the most important decisions that have been pronounced on its interpretation are :—*Mags. of Edinburgh v. Whitehead*, May 18, 1876, 3 R. 663 ; *Mags. of Edinburgh v. Edinburgh Ropery Co.*, Nov. 12, 1878, 6 R., H.L., 1 ; *Lamont*

*v. Rankin's Trs.*, Feb. 28, 1879, 6 R. 1416 (aff. Feb. 27, 1880, 17 Sc. L. R. 416); *Sturrock v. Smith or Carruthers*, May 21, 1880, 17 Sc. L. Rep. 562.

TT. VI.—OF THE RIGHT WHICH THE VASSAL ACQUIRES  
BY GETTING THE FEU.

1. Under the *dominium utile*, which the vassal acquires *dominium utile*; (1)  
by the feudal right, is comprehended the property of what-  
ever is considered as part of the lands, whether of houses, *what is com-  
prehended under it.*  
woods, enclosures, &c., above ground; or of coal, limestone, *Mills.*  
minerals, &c., underground. Mills have by the generality  
of our lawyers been deemed a separate tenement, and so (5)  
not carried by a charter and disposition, without either a  
special clause conveying mills, or the erection of the lands  
into a barony. It must be admitted that a mill is capable of  
being made a separate tenement by separating it from the  
lands by a disposition, since it is, in that case, susceptible  
of a seisin; but before such separation it is entirely *quæstio  
voluntatis* whether it will be carried by a conveyance of the  
lands; and it is certain that if a proprietor builds a mill on  
his own lands it will be carried by his entail, or by a retour,  
without mentioning it. (a) If the lands disposed be astricted,  
or thirled to another mill, the purchaser is not allowed to  
build a new corn-mill on his property, even though he  
should offer security that it shall not hurt the thirle; which  
is introduced for preventing daily temptations to fraud;  
*Urguhart v. Tulloch*, 1754, M. 16,028.

2. Proprietors are prohibited to build dovecotes unless *Dovecotes.*  
their yearly rent, lying within two miles thereof, extend to (7)  
ten chalders of victual; 1617, c. 19. All dovecotes are pre-  
sumed to have been built before this prohibition, if the con-  
trary be not proved. A purchaser of lands with a dovecote  
is not obliged to pull it down though he should not be

(a) The Court found that mills were carried by a disposition of the  
lands with parts and pertinents; *Rose v. Ramsay*, 1777, M. App. "Part  
and Pert." 1; Hailes 756.

Right of  
brewing.

(6, 6)

Steel-bow  
goods.

(12)

qualified to build one in terms of the Act; but if it becomes ruinous, he cannot rebuild it; *Kinloch v. Wilson*, Jan. 19, 1731, M. 3601. The right of brewing, though not expressed in the grant, is implied in the nature of property, *Nisbet v. Robertson*, 1681, M. 15,007; as are also the rights of fishing, fowling, and hunting, in so far as they are not restrained by statute.(b) Steel-bow goods, *i.e.*, corns, straw, cattle, or instruments of tillage, delivered by a landlord to the tenant upon his entry, for the like in quantity and quality to be redelivered to him at the end of the lease, pass with the lands to the purchaser, if the purchase be made by a rental; for as the tenant has been thereby enabled to give a higher rent, for which the purchaser is presumed to pay a just price, the purchaser would lose that very rent for which he has paid if the steel-bow goods were not esteemed part of his purchase; but in a bargain which is made without reference to a rental, the steel-bow, which is in itself a moveable subject, is not carried by the disposition.(c)

*Regalia.*

(13, 16)

Gold and silver  
mines.

3. There are certain rights naturally consequent on property, which are deemed to be reserved by the Crown as *regalia*, unless they be specially conveyed. Gold and silver mines are of this sort. The first universally; and the other, where three halfpennies of silver can be extracted from the pound of lead, 1424, c. 12 (three halfpennies in the reign of James I. were equal to about two shillings five pennies of our present Scots money, according to Mr. Ruddiman, Pref. to Diplom. Scot., p. 82). These were by our ancient laws annexed to the Crown; but by an unprinted Act, 1592, No. 12,(d) they are dissolved from it; and every freeholder (that is, as to this question, every proprietor, though he should hold his lands of a subject, *D. Argyll v. Murray*, Dec. 8, 1739, M. 13,526) is entitled to a grant of the mines within

(b) See above, ii. 1, 6, note.

(c) Seats in a parish church and servitudes (Bell's Pr. 744, 745) and trout-fishing (*ib.*, *Mackenzie v. Rose*, May 29, 1830, 8 S. 816, aff. May 14, 1832, 6 W. & S. 31; *Macdonald v. Farquharson*, Dec. 14, 1836, 15 S. 259) pass as pertinents of lands without express mention.

(d) Thomson's Acts, vol. iii. pp. 556-558.

his own lands, with the burden of delivering to the Crown a tenth of what shall be brought up; *E. Hopetoun v. Officers of State*, Jan. 12, 1750, M. 13,527. This unprinted statute mentions also tin and copper mines as if these were *inter regalia*.

4 Salmon-fishing is likewise a right understood to be reserved by the Crown if it be not expressly granted;(e) but forty years' possession thereof, where the lands are either erected into a barony, or granted with the general clause of fishings, establishes the full right of the salmon-fishing in the vassal.(g) A charter of lands, within which any of the King's forests lie, does not carry the property of such forest to the vassal. In charters granted with a right of a free forestry, the vassal was entitled to the privileges belonging to a king's forest, which see in 1592, c. 128; 1594, c. 210. These were so grievous to the neighbouring proprietors that the Court of Session gave their opinion for applying to the Crown against the future erection of lands

Salmon-fishing.

(15)

Forestry.

(14)

(e) The right of the Crown to salmon-fishings on the open sea-coast of Scotland, not granted to subjects, was established by *Commrs. of Woods, &c. v. Gammell*, March 6, 1851, 13 D. 854, aff. March 28, 1859, 3 Macq. 419.

(g) "The possession being held to explain the ambiguous grant; *Duke of Queensberry v. Stormonth*, 1773, M. 14,251. But possession merely by rod-fishing is insufficient; *Milne v. Smith*, Nov. 23, 1850, 13 D. 112. An opinion was expressed in *Abercromby v. Breadalbane* (July 18, 1843, 5 D. 1389), that possession of salmon-fishings by rod and spear is insufficient to found a prescriptive title."—MOIR. See *Stuart v. M'Barnet*, March 30, 1867, 5 Macph. 763; *Ramsay v. D. of Roxburgh*, Feb. 9, 1848, 10 D. 661; *D. of Sutherland v. Ross*, June 11, 1836, 14 S. 960. "The right of fishing in a river implies a right of access to the banks, even over the ground of other proprietors; *Miller v. Blair*, Nov. 22, 1825, 4 S. 214; though the right must be exercised in the way least oppressive to the adjoining heritor. But a right to use the river banks for rod-fishings is not implied in the right of net and coble fishing; *Guthrie v. Dunbar*, June 27, 1855, 17 D. 1002 (see the more recent decision, *D. of Richmond v. E. of Seafield*, Feb. 16, 1870, 8 Macph. 530). The right of trout-fishing must be an accessory of lands, or the subject of express permission or lease by the proprietor of lands; it is not a privilege which can be acquired by the public by prescription, even where there is a public footpath along the bank of a river; *Ferguson v. Sheriff*, July 18, 1844, 6 D. 1363."—MOIR.

into a forestry; *M. Athole v. L. Faskellie*, June 24, 1680, M. 4653.(h)

*Res publicæ*  
now *inter*  
*regalia*.

(17)

Right of free  
port.

5. All the subjects which were by the Roman law accounted *res publicæ*, as rivers,(i) highways,(k) ports,(l) &c., are, since the introduction of feus, held to be *inter regalia*, or in *patrimonio principis*; and hence encroachment upon a highway is said to infer purpresture; R. M., l. 2, c. 74, § 1. No person has the right of a free port without a special grant, which implies a power in the grantee to levy anchorage and shore dues, and an obligation upon him to uphold the port in good condition. In this class of things our forefathers reckoned fortalices or small places of strength, originally built for the defence of the country, either against foreign invasions, or civil commotions; but these now pass with the lands in every charter.(m)

Pertinentia.

(3)

6. The vassal acquires right by his grant, not only to the lands specially contained in the charter, but to those that have been possessed forty years as pertinent thereof.(n) but

(h) Exclusive right to oyster and mussel fishings also requires express grant, or forty years' possession on a general title, or may be established under the authority of the Board of Trade; Bell's Pr. 646; 31 & 32 Vict. c. 45.

(i) *Grant v. Gordon*, 1781, M. 12,820, aff. 2 Pat. 582; *Colquhoun v. Mags. of Dumbarton*, 1793, M. 12,827; *L. Adv. v. Clyde Trs.*, Jan. 23, 1849, 11 D. 391, H. L., March 12, 1852, 1 Macq. 46.

(k) Bell's Pr. 659 *et seq.*

(l) *Mags. of Campbelton v. Galbraith*, Dec. 14, 1844, 7 D. 220; *Officers of State v. Christie*, Feb. 2, 1854; 16 D. 454. The right to make a harbour does not import a right of property in the *solum* on which it is placed; *Scrabster Harbour Trs. v. Sinclair*, March 16, 1864, 2 Macph. 884. As to the Crown's right in the foreshores, see *Lord Advocate v. Agnew*, Jan. 11, 1873, 11 Macph. 309.

(m) The right of ferry is also vested in the Crown for public use; but though the Crown may grant a private right of ferry, it cannot by doing so interfere with navigation; Bell's Pr. 645, 652; *Ferguson v. Brash*, Jan. 18, 1815, F.C.; *Mags. of Kirkcaldy v. Greig*, May 21, 1851, 13 D. 975; *Weir v. Aiton*, May 25, 1858, 20 D. 968. A grant of barony is a title on which a right of ferry may be acquired by prescription; *D. of Montrose v. M'Intyre*, March 10, 1848, 10 D. 896.

(n) "The grant of the lands includes all parts and pertinents even without these words being added; *Gordon v. Grant*, Nov. 12, 1858, 13 D. 1. Parts and pertinents include not merely the natural appendages to

(1) If the lands in the grant are marked out by special limits, the vassal is circumscribed by the tenor of his own right, which excludes every subject without these limits from being pertinents of the lands; *Young v. Carmichael*, Nov. 17, 1671, M. 9636.(o) (2) A right possessed under an express infestment is preferable, *cæteris paribus*, to one possessed only as pertinent. (3) Where neither party is infest *per expressum*, the mutual promiscuous possession by both of a subject as pertinent, resolves into a commonalty of the subject possessed: but if one of the parties has exercised all the acts of property of which the subject was capable, while the possession of the other was confined to pasturage only, or to casting feal and divot, the first is to be deemed sole proprietor, and the other to have merely a right of servitude.

7. As barony is a *nomen universitatis*, and unites the several parts contained in it into one individual right, the general conveyance of a barony carries with it all the different tenements of which it consists, though they should not be specially enumerated (and this holds even without erection into a barony, in lands that have been united under a special name; *Lord Borthwick v. Gallowshiels*, March 23, 1622, 1 B. S. 2). Hence, likewise, the possession by the vassal of the smallest part of the barony-lands preserves to him the right of the whole. The privilege of barony, though it carries no right of itself to the *regalia* without a special grant, has the effect to transmit from the baron to his heir or successor

Privileges of  
barony.

(18)

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the lands, such as woods, mines, minerals, coals, and quarries, but rights of servitude, or even commonalty in other lands, or separate tenements, which have become pertinents of the land disposed by a course of prescription; Inst. ii. 6, 3. 'Separate farms or tenancies, though not formerly reputed to belong to the land conveyed, may be carried if possessed as pertinent beyond the memory of man;' and even ground included in the titles of another; see *Earl of Fife's Trs. v. Cuming*, Jan. 16, 1830, 8 S. 326."—MOIR.

(o) "The proprietor of a barony, with a clause of parts and pertinents, but whose titles describe his lands as lying within a particular parish, cannot acquire by prescriptive possession any right of common property in lands lying beyond that parish; *Hepburn v. D. of Gordon*, Nov. 25, 1823, 2 S. 525. And the authority of that case, though disputed, was confirmed in *Gordon v. Grant*, Nov. 12, 1850, 13 D. 1."—MOIR.

such of them as the baron himself had formerly a right to; *E. Argyll v. Campbell*, Jan. 15, 1668, M. 9631.(p)

(20, 21)

8. The vassal is entitled, in consequence of his property, to levy the rents of his own lands, and to recover them from his tenants by an action for rent before his own Court; and from all other possessors and intromitters, by an action of mails and duties before the sheriff. He can also remove from his lands tenants who have no leases, and he can grant tacks

Tack or lease.

or leases to others. A tack is a contract of location, whereby the use of land, or any other immoveable subject, is set to the lessee or tacksman for a certain yearly rent, either in money, the fruits of the ground, or services. It ought to be

Verbal tack.

reduced into writing, as it is a right concerning lands. Tacks, therefore, that are given verbally, to endure for a term of years, are good against neither party for more than one year; *Keith v. Johnston's Tenants*, July 16, 1636, M. 8400.(q) An obligation to grant a tack is as effectual against the granter as a formal tack.(r) A liferenter, having temporary property in the fruits, may grant tacks to endure for the term of his own liferent.

(p) See above, t. iii. s. 22.

(q) "Even in the case of a verbal lease for years, if some extraordinary expenditure has been made by the tenant unequivocally referable to the verbal contract, such as the erection of a house and offices or the payment of a large grassum, this will prevent the landlord from ousting the tenant, and will support the right of the latter to the full endurance of the lease. If the lease be in writing, though defective in its formalities, it is rendered binding on the granter and his heirs by *rei interventus*, i.e., by something done on the faith of the lease by the tenant; and even against *singular* successors if the lease be special and definite in subject, in rent, and in duration, and if possession has followed on the informal lease."—*MORR.* See *Murdoch v. Moir*, June 18, 1812, F.C.; *Macrorie v. M'Whirter*, Dec. 18, 1810, F.C.; *Spencer, Sutherland, & Co. v. Hay*, Dec. 12, 1845, 8 D. 283; *Pratt v. Abercromby*, Nov. 18, 1858, 21 D. 19. Before *rei interventus* can have the effect of validating a verbal lease for a term of years, it seems that there must be evidence by writ or oath of party of a *consensus in idem placitum*, or concluded agreement; *Fraser v. Brebner*, Feb. 10, 1857, 19 D. 401; *Walker v. Flint*, Feb. 20, 1863, 1 Macph. 417; *Emslie v. Duff*, June 2, 1865, 3 Macph. 854; *Fowlie v. M'Lean*, Jan. 8, 1868, 6 Macph. 254.

(r) *Garioch v. Forbes*, 1850, M. 15,177; *Arbuthnott v. Campbell*, 1793, Hume 785.

9. The tacksman's right is limited to the fruits which spring up annually from the subject set, either naturally or by the industry of the tacksman; he is not, therefore, entitled to any of the growing timber above ground, and far less to the minerals, coal, clay, &c., under ground, the use of which consumes the substance; *Colquhoun v. Watson*, Feb. 15, 1668, M. 15,253.(s) Tacks are, like other contracts, personal rights in their own nature, and consequently ineffectual against singular successors in the lands, whose right reaches to the removing of tenants from their own property, notwithstanding any tack they may have got from the former proprietor. To make tacks real, they were sometimes executed of old in the form of charters, and perfected by seisin; but all tacks were, by 1449, c. 17, for the encouragement of agriculture, declared effectual to the tacksman for the full time of their endurance, into whose hands soever the lands might come.

What is included in the right of tack.

(22, 23)

Tacks, though in themselves personal,

are now in certain respects real rights.

10. To give a written tack the benefit of this statute, it must mention the special tack-duty payable to the proprietor, which, though small, if it be not elusory,(t) secures the tacksman; and it must be followed by possession, which supplies the want of a seisin: if therefore the setter or lessor shall be divested of the property before the term of the tenant's entry, the tack is not good against a singular successor; for a tenant can have no possession on his tack till that term; *Johnstone v. Cullen*, M. 15,231.(u) If a tack does not express the

Requisites of a real tack.

(24, 25)

If must be followed by possession;

(s) So found as to coal, *Smith v. Macgill*, 1768, M. 15,266; shell-marl, *Bahune v. Jervise*, 1773, M. 15,267; sea-ware for the manufacture of kelp, *Campbell v. Campbell*, 1795, M. 9646; saugh or willow-trees of a large size, *Bogus v. Wight*, 1806, M. App. "Planting," 2. Neither is an agricultural tenant entitled to angle for trout in a pond within his farm; *Maxwell v. Copland*, Nov. 20, 1868, 7 Macph. 142.

(t) "This is a term somewhat difficult to define, and on which the cases do not throw much light. It is certain (1) that the stipulated rent may be far below the true value of the farm; and (2) that although a grassum has been taken, which of course diminishes the amount of the rent, the lease is still good against a singular successor, except in cases of entail."—MOIR.

(u) *Redhead v. Kerr*, 1792, Bell's 8vo Cases, 202, 3. Pat. 317; see *Pratt v. Abercromby*, Nov. 18, 1858, 21 D. 19.

term of entry, the entry will commence at the next term after its date, agreeably to the rule, *quod purè debetur, præsentī die debetur*. If it does not mention the ish, i.e., the term at which it is to determine, it is good for one year only; but if the intention of parties to continue it for more than one year should appear from any clause in the tack, e.g., if the tenant should be obliged to lead annually a certain quantity of coals, it is sustained for two years as the *minimum*; *Ridpath v. White*, Nov. 22, 1737, M. 15,196.(x) Tacks granted to perpetuity, or with an indefinite ish, have not the benefit of the statute; *Dobie v. Stevenson*, June 1666, M. 1283.(y) If a tack has the essential characters of a contract

and the ish  
must be  
definite.

(x) *Clark v. Lamont*, Jan. 27, 1816, F.C.; *Russell v. Freen*, May 14, 1835, 13 S. 752; *M'Leod v. Urquhart*, 1808, Hume 840.

(y) "A lease of very long endurance, such as 1260 years, has been sustained against the granter and his heirs, but no rule has yet been fixed as to duration in questions with singular successors. It does not appear that the criterion adopted under entail prohibitions, which annul long leases as alienations, can be applied to leases granted by fee-simple proprietors. 'The common term,' says Mr. Bell (Pr. 1195), 'is nineteen years, which, whether it corresponds to any physical revolution of the seasons or not, seems to give no recognised rotation of crops. A double term of nineteen or thirty-eight years has been usually recognised as fit for improving leases, while in mineral or coal leases a longer term still has been common, having regard to the extraordinary expense and slow returns. Long terms have also been sanctioned as suitable to building leases where a large expenditure is necessary at the first, and the houses built remain long habitable. Amidst these varieties, it may perhaps be held that leases for the usual period, either of agricultural or improving leases, will be good against singular successors; that liferent leases, or leases for a term terminating in a liferent, will be effectual; that building leases for such reasonable term as to indemnify the expense will be protected, and that mining leases may be greatly prolonged.' Though this leaves the matter somewhat indefinite, I do not think the doctrine as to the duration of leases which will be effectual against a singular successor can be more specifically laid down. A lease, however, for a period of five years, containing an obligation to renew for other five years, '*et sic in infinitum*,' was held invalid against singular successors; *Crichton v. Viscount of Ayr*, July 26, 1631, M. 11,181. And a lease to a person during his life, and to his heir during his life, containing an obligation on the lessor and his successor in all time coming to grant leases to the lessee's heirs, was set aside; *Oswald v. Robb*, July 20, 1688, M. 15,194. Although in *Wight v. Earl of Hopetoun*, Nov. 17, 1763, M. 10,461 and 15,199, a lease of this

it is effectual against the granter, and his heirs, though it should have none of the solemnities necessary to bring it within the statute, *e.g.*, though it were granted for perpetuity (*Crichton v. L. Air*, July 26, 1631, M. 11,182), or were not clothed with possession.

11. Though this act mentions only tacks of land, custom has by analogy extended it to tacks of mills, salmon-fishings, and collieries, all which are subjects *fundo annexa*; (z) but tacks of houses within borough do not fall within the act, because these are, by the more common practice, set from year to year; *Rae v. Finlayson*, Feb. 5, 1680, M. 10,211 and 15,216.(a) The statute does not defend the tacksman against the landlord's superior, when the fee opens to him by non-entry; for the superior is not bound to regard any deed of his vassal not consented to by himself; but upon the heir's entry, the tacksman's right, which before lay dormant, revives, and continues for as many years as the tack had to run when he was first excluded. The same doctrine obtained in ward.

Tacks of mills;  
(27, 28)  
and of houses  
within  
borough.

12. If the tack-duty be made payable, not to the setter himself, but to one of his creditors; or if the tacksman be allowed retention thereof by his lease in payment of a debt due to himself by the setter, such clause is unavailable

A clause of  
retention of  
rent, if good  
against singu-  
lar successors.  
(29, 28)

kind was sustained against a singular successor, this was on the ground that he had accepted of a disposition of the lands with an exception of the lease in the clause of warrandice."—MOIR. Compare *Earl of Hopetoun v. Wight*, July 10, 1863, 1 Macph. 1097, aff. May 27, 1864, 4 Macq. 729, 2 Macph. (H.L.) 35; *Earl of Hopetoun v. Hunter's Trs.*, July 10, 1863, 1 Macph. 1074, rev. June 13, 1865, 4 Macq. 972, 5 Macph. (H.L.) 50.

(z) "A lease of game, though followed by possession, is not effectual against singular successors; *Pollock, Gilmour, & Co. v. Harvey*, June 5, 1828, 6 S. 913. At the same time opinions have been expressed that a lease of game for nineteen years, granted by an heir of entail, would be good against a succeeding heir of entail, though not falling within the words of the Act 1449.—See note of Lord Ardmillan in *Earl of Fife's Trs. v. Wilson*, Dec. 14, 1859, 22 D. 191."—MOIR. A lease of land with the game, when the agricultural value is nil, and the true object of the lease is the game, is valid. See *Farquharson v. Farquharson*, Nov. 3, 1870, 9 Macph. 66.

(a) The contrary was decided in *Waddell v. Brown*, M. 10,309; *M<sup>r</sup> Arthur v. Simpson*, 1804, M. 15,181

against singular successors; (b) for the statute was only designed to secure tacksmen in their possessions, not the creditors to whom the tack-duty might be made payable. The contrary doctrine would render tacks equal to rights of wadset, and consequently, as tacks need not be registered, would destroy the security intended for purchasers by the records. Singular successors, therefore, can in such case sue the tacksmen for the duties contained in their tacks; but where the tacksmen himself is the creditor, the clause of retention will defend him as to all tack-duties prior to litiscontestation, or other legal interpellation; *Mactavish v. M'Lauchlan*, 1748, M. 1736 and 15,248. Tacks, being *quodammodo* real rights, entitle the tacksmen to an action of mails and duties, or of removing, against possessors; and if he has been seven years in possession upon his tack, he has the benefit of a possessory judgment, whereby he may continue his possession, even against one having a preferable right, till his tack be formally reduced; iv. i. 25.

Tacks are  
*stricti juris*.  
(31, 32)

13. Tacks necessarily imply a *delectus personarum*, a choice by the setter of a proper person for his tenant. Hence the conveyance of a tack, which is not granted to assignees, is ineffectual without the landlord's consent. (c) A right of tack,

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(b) *Ross v. C. Sutherland*, June 21, 1838, 16 S. 1179. "There may, however, be a right of retention stipulated in the lease, not for debt or interest of debt due by the landlord, but for obligations laid on the landlord by the lease and connected with the lands let (*e.g.*, completion of fences, building of farm offices, expense of draining or enclosing). Effect has been given to the right of retention of rent on such grounds, where there was no stipulation, but merely a local custom to that effect; *Arbuthnot v. Colquhoun*, 1772, M. 10,424."—MOIR. *Bell v. Lamont*, June 14, 1814, F.C.; see Bell's Com. i. 74 (892 Shaw's ed.), Bell's Pr. 1202; *Dods v. Fortune*, Feb. 4, 1854, 16 D. 478.

(c) This does not apply to leases of urban tenements, which are assignable without the landlord's consent; *Aitchison v. Berry*, 1748, M. 10,406, Elch. "Tack," 13, Notes, 444; *Anderson v. Alexander and Miller*, July 10, 1811, F.C. "At first, in agricultural subjects, even the heir-at-law of the tenant was held to be excluded; but now tacks pass to heirs though not mentioned. The term is still held to mean merely the heir-at-law, and to exclude the right of the tenant to name any party as heir if the landlord object. It is *jus tertii*, however, for the heir-at-law to object; the lessor alone is entitled to interfere; see *Cunningham v. Grieve*, March 8, 1803, M. 15,298,

though it be heritable, falls under the *jus mariti*, because it cannot be separated from the labouring cattle and implements of tillage, which are moveable subjects; *Hume v. Taylor* Jan. 1734, M. 5700, 7199, and Elch., "Tack," 2.(d) A tack,

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and App. 'Tack,' 9, 4 Pat. 571, 6 Pat. 16; and again in *Hay and Wood, petrs.*, Dec. 8, 1801, M. 15,297. The implied exclusion of assignees or sub-tenants in proper agricultural leases exists only in leases of ordinary duration. If the lease be for longer than the usual nineteen years, the law implies a power of assigning or sub-letting. This privilege is also implied in *life-rent* leases, though, of course, the right of the assignee or sub-tenant depends on that of the cedent or sub-lessor, and expires when his right comes to an end; Bell's Com. i. 77. In ordinary agricultural leases the implied exclusion of assignees or sub-tenants does not exclude creditors from attaching the lease by legal diligence. Where a lease contains an exclusion of assignees and sub-tenants, unless approved of by the landlord, it was at one time held that the landlord could not arbitrarily refuse his consent, and might be compelled to receive the assignee if he could assign no good reason for rejecting him. But this is now altered; *Muir v. Wilson*, Jan. 20, 1820, F.C.; and the landlord's power of exclusion is absolute. The mere bankruptcy of the tenant does not bring the lease to an end, unless there be a clause irritating the lease in that event. The question whether in a lease granted for manufacturing purposes, an exclusion of assignees precludes the tenant from assuming partners and conveying to them or to the company, was raised but not decided in *Dick v. Skails*, Feb. 21, 1706, 4 B. S. 642. But there is every reason to think that the judgment would now be in favour of the tenant's right so to deal with the lease; *Hunter, L. & T.*, i. 236 (4th ed. 246). It has been questioned whether, if an urban lease be only for one year, power to assign or sub-let is to be inferred. The opinion of Mr. Bell (Pr. 1274) is for the affirmative. It would seem that the tenant of a furnished house has no power of assigning or sub-letting. The rule that, in the lease of an urban subject, there is an implied power to assign or sub-let cannot be applied to a mixed contract, which is one of lease as to the house, and of mere location or hiring as to the furniture. It is an open question whether, in leases of mines or fishings, the exclusion of assignees or sub-tenants is to be implied if not expressed. When there is a power of assigning or sub-letting, the assignee or sub-tenant must complete his title by possession. Mere intimation to the landlord is not sufficient. But when the assignation is complete, the liability of the former tenant ceases, and the assignee comes in all respects into the place of the cedent. This is contrary to Bankton, Erskine, and Ross; but their doctrine is erroneous; *Skene v. Greenhill*, May 20, 1825, F.C., 4 S. 25.—MORR.

(d) "There is an inaccuracy here in stating that the *right of tack* falls under the *jus mariti*. The yearly profits, indeed, like the rents of heritable property, fall under the *jus mariti*, but the *right of tack* itself belongs

therefore, granted to a single woman, falls by her marriage; because the marriage, which is a legal conveyance thereof to the husband, cannot be annulled. This implied exclusion of assignees is, however, limited to voluntary, and does not extend to necessary, assignments, as an adjudication of a tack by the tacksman's creditor; but a tack expressly excluding assignees cannot be carried even by adjudication; *Elliott v. D. of Buccleuch*, 1747, M. 10,329. Liferent tacks, because they import a higher degree of right in the tacksman than tacks for a definite term, may be assigned, unless assignees be specially excluded: these, therefore, when granted to a woman, do not fall by marriage, though Craig asserts the contrary, 279, § 6.

Liferent tacks  
are assignable.

Tacksman may  
sub-set.

(33, 34)

14. It is not a fixed point whether a tacksman may sub-set the lands without an express power of subsetting. Lord Stair (ii. 9, § 22) and Mackenzie (h. t.) affirm he cannot; but it was adjudged, *Rochead v. Moodie*, 1687, M. 10,392, that he might, even where the tack excluded assignees *per expressum*; far more ought he to have this power where the exclusion of assignees is only implied.(e) A sub-tack requires the same solemnities, and has the same effects as a principal tack. It defends against singular successors; and the principal tacksman cannot, by renouncing his tack to the setter, hurt the right of the sub-tacksman. An assignee to a tack is personally liable to the setter, not only for the current tack-duties, while his assignation subsists, but for those that remained unpaid at the date of the assignation; for he comes in the place of the cedent, or principal tacksman, and so is bound as fully as he, yet without extinguishing the obligations under which the cedent himself was laid by the original

Effect of sub-  
tack.

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exclusively to the wife, and cannot be attached by the husband or his creditors."—MORE. The husband takes the lease, not as assignee, but as administrator for his wife; *Gillon v. Muirhead*, 1775, M. 15,286, Hailes 631.

(e) Power to sub-let is implied in leases of "extraordinary duration," and a lease for thirty-eight years has been held to be such; *Simson v. Gray*, 1794, M. 15,294; *Pringle v. MacLagan*, 1802, Hume 1808; it does not exist in one for nineteen or twenty-one years; *Alison v. Proudfoot*, 1788, M. 15,290; *E. Cassilis v. Macadam*, 1806, M. App. "Tack," 14; unless permission or power to sub-let be specially proved; *E. Glasgow v. Hamilton*, July 3, 1851, 13 D. 1290.

tack.(g) A sub-tacksman may pay his tack-duty to the principal tacksman whose tenant he is; but the setter is preferable on it, in as far as it remains unpaid, in a competition with the other creditors of the principal tacksman; *Anderson v. Town of Edinburgh*, Jan. 31, 1665, M. 6235.

15. If neither the setter nor tacksman shall properly discover their intention to have the tack dissolved at the term fixed for its expiration, they are understood or presumed to have entered into a new tack upon the same terms with the former (l. 14, *loc. cond.* (19, 2)), which is called *tacit relocation*, and continues till the landlord warns the tenant to remove, or the tenant renounces his tack to the landlord; (h) this obtains also in the case of moveable tenants, who possess from year to year without written tacks. In judicial tacks set by the Court of Session, where cautioners are always interposed, tacit relocation cannot subsist on the same footing with the written tack; because the cautioners in these tacks are loosed from their engagements at the expiration of the term to which they had bound themselves; neither is there any deed of the Court by which their consent to continue such tack can be inferred; for they are not in use to warn their tacksmen to remove. Judicial tacksmen are therefore accountable as factors after the expiration of their tacks; *Bethune*, Dec. 1719 (n.r.).(i)

Tacit relocation,

(35, 36)

has no place in judicial tacks.

16. Rentals (now seldom used) were a sort of liferent tacks (arg. 1587, c. 68), granted either to the lineal successors of the ancient possessors, or to those whom the landlord designed to favour as such, for an easy or favourable tack-duty. These tacksmen had the name of kindly tenants

Rentals.

(37, 38)

(g) This is not so. See above, § 13, note (c) fin.

(h) See *infra*, § 19, note.

(i) "Neither is tacit relocation implied in leases of pasture fields, which are generally let from year to year; *M'Harg*, 1805, M. App. 'Removing,' 4; and it seems doubtful whether (it be so) in a lease of an arable farm for one year. Probably the analogy of pasture fields would be followed. In tacit relocation, although the parties are held to have renewed their contract, the former lease is so far at an end that a cautioner under it for the rent is no longer liable; *Forbes v. Salton's Exrs.*, 1735, Elch., voce 'Cautioner,' No. 4."—MOIR.

or rentallers; and at their entry they paid a certain sum as a present to the landlord for their right, more or less, according to the custom of the barony. If the rental was not delivered in writing to the rentallers, it could not operate against the landlord's singular successors,<sup>(k)</sup> but an enrolment of the tenant as a rentaller in the landlord's rental book was effectual against the landlord himself and his heirs. A rentaller who assigned his right without the landlord's consent was punished for his ingratitude by the forfeiture of his rental; whereas in common tacks there is no forfeiture, the assignation is only null, except in the case of an assignation by marriage, which is explained above, § 13. Where the rental was granted to the rentaller personally, it was found to last only during the joint lives of the setter and rentaller (*Ayton v. Tenants*, July 5, 1625, M. 7191), contrary both to the nature of liferent tacks and to the opinion of V. Stair, ii. 9, 20. Where it was granted to the rentaller and his heirs, it determined upon the death of the first heir; *Ahannay v. Aiton*, March 13, 1632, M. 15,191, conformable to l. 14, *C. de usufr.* (3, 33).<sup>(l)</sup>

A rentaller who assigns forfeits his rental.

How long rentals endure.

Obligation upon the setter in tacks of land;

17. In tacks of land, the setter is commonly bound to put all the houses and office-houses necessary for the farm in good condition at the tenant's entry;<sup>(m)</sup> and the tenant

(39)

(k) As to the effect of entry in a rental followed by possession, but without delivery of lease, see *Campbell v. M'Kinnon*, March 20, 1867, 5 Macph. 636, 8 Macph. (H.L.) 40.

(l) There is an exception in the case of the Crown rentallers of Lochmaben, whose rights are perpetual; *Kindly Tenants of Lochmaben*, 1726, M. 15,195; *Irving and Jop*, 1795, M. 10,316; Ross's Lectures, ii. 481.

(m) "Except where it is stipulated that the tenant accepts them as they stand. But when once delivered there exists no obligation on the landlord to restore the houses or buildings if destroyed by inevitable accident; *Walker v. Bayne*, May 30, 1811, F.C., rev. July 3, 1815, 6 Pat. 217. The Court of Session went on the brocard *Res perit suo domino*. And as they held the landlord to be exclusively the *dominus*, and no fault was attributable to the tenant, they considered the landlord liable to rebuild. In the House of Lords it was laid down that the meaning of the maxim was, that both landlord and tenant were *domini*, each to the extent of his own interest—the one temporary, the other permanent; that therefore the loss must fall on each according to his interest; and that neither party was bound to rebuild. The judgment, however, reserved

must keep them, and leave them so at his removal. But in tacks of houses, the setter must not only deliver to the tenant the subject set, in tenantable repair at his entry, but uphold it in that repair during the whole years of the tack; and if it should become insufficient before the ish, though without the setter's fault, the tack-duty must either be entirely remitted, or suffer an abatement in proportion to the damage sustained by the tenant; *Hamilton*, Jan. 2, 1667, M. 10,121; *Deans v. Cromby*, M. 10,122.(n) in tacks of houses.  
(43)

18. A tenant, if his landlord should refuse the virtual-rent when offered in due time, is liable only for the prices as fixed for the sheriff-fiars of that year; but if he has not timeously offered his rent in kind, he must pay the value at the ordinary prices of the country;(o) and, over and above, make good to the heritor the damages incurred by him through the not-delivery, if, *e.g.*, he should be thereby disabled from performing a contract with a merchant to whom he had sold his farms. If the inclemency of the weather, inundation, or calamity of war, should have brought upon the crop an extraordinary damage (*plus quam tolerabile*), the landlord had, by the Roman law, no claim for any part of the tack-duty. If the damage were more moderate, he might exact the full rent; L. 25, § 6, *locati* (19, 2). It is nowhere defined what degree of sterility or devastation makes a loss not to be borne, but the general rule of the Roman law seems to be made ours; *Tacksmen of Customs v. Greenhead*, M. 10,121.(p) Tenants are obliged to pay no Obligation on the tacksman;  
(40-42)  
  
in case of sterility;  
  
as to public burdens;

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to the tenant any remedy he might have, either by abandonment of the contract, or by obtaining an abatement of rent, neither remedy apparently being very available."—MOIR. See *D. of Hamilton's Trs. v. Fleming*, Dec. 23, 1870, 9 Macph. 329.

(n) *Napier v. Ferrier*, June 24, 1847, 9 D. 1354; *Lowndes v. Buchanan*, Nov. 17, 1854, 17 D. 63; *Goskirk v. Edin. Ry. Access Co.*, Dec. 19, 1863, 2 Macph. 383; *Kippen v. Oppenheim*, Dec. 13, 1847, 10 D. 242. But the tenant may be barred by delay in giving notice of defect or insufficiency from obtaining an abatement of rent; *Thomson v. Paxton*, June 6, 1849, 11 D. 1113.

(o) *E. of Elgin v. Wellwood*, Jan. 3, 1825, 3 S. 422.

(p) The rules stated in the text have been illustrated in the case of minerals (although in leases of mines it is usual to insert stipulations

cesses or public burdens to which they are not expressly bound by their tacks; but the law itself divides the burdens of the schoolmaster's salary equally between the proprietor and his tenants; 1696, c. 26.(g) Clauses were formerly thrown into most tacks obliging tenants to services indefinitely, under the name of arriage and carriage, or services as to services. used and wont; but by the Act abolishing ward-holdings(r) tenants are exempted from 'all services that shall not be specially mentioned either in their tacks or in a separate writing except mill services,(s) which continue as formerly.(t)

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providing for the event of exhaustion); see *Murdoch v. Fullerton*, Feb. 12, 1829, 7 S. 404; *White v. Moncrieff*, March 9, 1849, 11 D. 1031; *Dixon v. Campbell*, Feb. 9, 1821, F.C., H.L., April 30, 1824, 2 S. App. 175; *Gowans v. Christie*, Feb. 8, 1871, 9 Macph. 485, aff. Feb. 14, 1873. And a material increase in the stock of game kept on the farm by the landlord entitles the tenant to damages; *Wemyss v. Wilson*, Dec. 2, 1847, 10 D. 194; *Morton v. Graham*, Nov. 30, 1867, 6 D. 71; *Inglis v. Moir's Tutors*, Dec. 7, 1871, 10 Macph. 204.

(g) The Act on this subject now in force is 35 & 36 Vict. c. 62, § 78. The same division takes place in assessments for poor-rates, 8 & 9 Vict. c. 83; and roads, 41 & 42 Vict. c. 51.

(r) 20 Geo. II. c. 50, §§ 21, 22.

(s) See below, t. ix.

(t) "In the absence of special regulations in the lease as to management, the law requires the tenant to cultivate according to the laws of good husbandry; *Maxwell v. M'Murray*, 1776, 5 B. S. 515; *Fleming v. Macdonald*, March 16, 1860, 22 D. 1029. The tenant must stock the farm sufficiently; and if he fail to do so he may be removed by summary application to the sheriff. If there be no stipulation as to the tenant's being paid for improvements at the close of the lease, he has no claim for any buildings, fences, or other meliorations, these being presumed to have been made for his own interest and convenience only. Even without express stipulation, the tenant is bound to use the dung made on the farm in its cultivation, and to consume the fodder by his cattle. He cannot sell or dispose of any part of it during the lease; and if he happen to have two farms close to each other, he cannot use the dung made on the one for the benefit of the other. But as the tenant cannot use the straw, or apply the dung of the last year's crop, after his possession is at end, the general usage in Scotland is to allow the tenant to carry off the straw, or sell the dung of the last crop, unless by the lease there be an express stipulation that these shall be left; *Gordon v. Robertson*, March 11, 1825, 3 S. 656, rev. May 19, 1826, 2 W. & S. 115."—MOIR.

19.(u) Tacks may be evacuated during their currency—(1) Determination of tacks during their currency;  
 In the same manner as feu-rights, by the tacksman's running (44)  
 in arrear of his tack-duty for two years together.(v) This irritancy, though it was by our former practice triable only by the Court of Session, may now be declared before the Judge-Ordinary, by Act S., Dec. 14, 1756; but it may be prevented by the tenant making payment at the Bar before sentence.(w)  
 (2) Where the tenant either runs in arrear of one year's (x) rent,(y) or leaves his farm uncultivated at the usual season, the Judge-Ordinary, when applied to by the proprietor, is required, by the said Act S., to ordain the tenant to give security for the arrears, and for the rent of the five(z) following crops, if the tack shall subsist so long; otherwise, to discern him to remove as if the tack was at an end.(a) Tacks may be evacuated at any time by the mutual consent of parties, e.g., by the tacksman's renunciation accepted by the proprietor: but verbal renunciations may be resiled from.(b)

20. The tenant who intends to quit his possession at the upon their determination.  
 ish of his tack ought, in Craig's opinion (268, § 3), to deliver (44, 45)  
 a written renunciation thereof to his landlord, forty days before the term of Whitsunday at or immediately preceding

(u) See *infra*, § 29, note.

(v) Now one year.

(w) *Kennedy v. Alison*, 1807, Hume 578. The Act 16 & 17 Vict. c. 80, § 32, creates a similar irritancy, with a process of removing before the sheriff, in regard to subjects held under leases of longer duration than twenty-one years. In regard to these, which are of the nature of rights of property, the application of this irritancy seems to have been doubted.

(x) Now six months.

(y) *I.e.*, the amount of one year's rent, though made up of the arrears of several; *Urquhart v. M'Kenzie*, May 28, 1824, 3 S. 84.

(z) Now only one year farther.

(a) But consignation of the whole rent due before extract purges the irritancy; *M'Donald v. Jardine*, Nov. 25, 1825, 4 S. 227; *Marshall v. Reid*, 1803, Hume 569. See *infra*, § 29.

(b) Such renunciation by a tenant at the end of his lease must be given forty days before the Whitsunday preceding the ish; *M'Intyre v. M'Nab's Trs.*, Dec. 11, 1829, 9 S. 237, aff. 5 W. & S. 299. As to obligations to remove contained in leases and letters of removing, see *infra*, § 21, note.

the ish; but renunciations are now seldom reduced into writing when they are not to have effect before the ish. The landlord, when he wanted to remove a tenant whose tack was expiring, or who possessed without a tack, might by our old custom, upon a previous verbal notice given to him, eject him *vid facti* the very day after the term at which he was obliged to remove, Craig, 268, § 4. But by 1555, c. 39, the tenant, upon a precept signed by the landlord, must be warned forty days preceding the term of Whitsunday before described, personally or at his dwelling-house, to remove at that term, with his family and effects. This precept must be also executed on the ground of the lands, and thereafter read in the parish church where the lands lie, after the morning service, and affixed to the most patent door thereof.(c) Whitsunday, though it be a moveable feast, is, in questions of removing, fixed to the 15th of May, by 1690, c. 39.(d) In warnings from tenements within borough,(e) it is sufficient that the tenant be warned forty days before the ish of the tack, whether it be Whitsunday or Martinmas, *Riddel v. Zinzan*, Nov. 21, 1671, M. 13,828; and in these the ceremony of chalking the door is sustained as a warning, when proceeding upon a verbal order from the proprietor, though without the warrant of a magistrate, *Barton v. Duncan*, June 24, 1709, M. 13,832.(f)

Warning,

in tenements  
within  
borough.

Warning is not  
now previously  
necessary.

(48, 50)

21. This process of warning was previously necessary for

(c) Affixing to the door of the churchyard has been sustained as equivalent; *Campbell v. Johnston*, 1793, M. 13,849. In practice the warning was read at the church door after forenoon service; Inst. l. c.

(d) And that term is so fixed "for all effects whatsoever," as well "as for removings," 1693, § 24. But though the tenant must remove from house and grass at Whitsunday, he is entitled to the grass crop of the last year, called the away-going crop; *Fullerton v. Crawford*, May 4, 1814, F.C., *Harvey v. King's Coll. of Aberdeen*, Nov. 29, 1845, 8 D. 151.

(e) Or houses in the country; *Lundin v. Hamilton*, 1758, M. 13,845.

(f) Warning in the case of urban subjects let on verbal leases, whether within or without burgh, may be informal, i.e., either by letter delivered at the house, or by verbal notice to the tenant or one authorised to transact for him, but not to a mere servant, or even to his wife, unless *preposita* for this purpose; *Morris v. Allan*, March 8, 1839, Hunter, L. & T. ii. 54; *Lambert v. Smith*, Nov. 11, 1854, 3 Macph. 43; *Slowey v. Robertson*, Nov. 12, 1865, 4 Macph. 1.

founding an action of removing against tenants, till the above-quoted Act S., Dec, 14, 1756, which leaves it in the option of the proprietor either to use the order prescribed by 1555, c. 39, or to bring his action of removing before the Judge-Ordinary; which, if it be called forty days before the said term of Whitsunday, shall be held as equal to a warning.<sup>(g)</sup> Where the tenant is bound by an express clause of his tack to remove at the ish of it without warning, such obligation is, by the said Act, declared to be a sufficient warrant for letters of horning; upon which, if the landlord charges his tenant forty days before the said Whitsunday, the judge is authorised to eject him within six days after the term of removing expressed in the tack.

22. Actions of removing might, even before this Act of sederunt, have been pursued without any previous warning

Extraordinary  
actions of  
removing.

—(1) Against vicious possessors, *i.e.*, persons who had seized the possession by force, or who, without any legal title, had intruded into it after the last possessor had given it up. (2) Against possessors who had a naked tolerance.<sup>(h)</sup> (3) Against tenants who had run in arrear of rent during the currency of their tacks; *Bethune's Tenants v. Bethune*, 1681, M. 7307. (4) Against such as had sold their lands, and yet continued to possess after the term of the purchaser's entry: for such possession is without a title. Upon the same ground warning was not required in removings against possessors of liferented lands, after the death of the liferenter who died in

(49)

(g) The action cannot be brought in the first instance before the Court of Session; *Cameron v. Macdonald*, 1804, M. 13,875. By 16 & 17 Vict. c. 80, it is made competent to raise a summons of removing at any time, provided there be an interval of forty days between the execution of the summons and the term of removal or the ish first in date, where there is a separate ish as regards lands and houses or otherwise. By § 30, a lease containing an obligation to remove is equivalent to a decree of removing, provided forty days' notice be given; and by § 31, a letter by the tenant binding himself to remove has the same effect. A decree of removing may be extracted within forty-eight hours; A. of S., Jan. 10, 1839, § 113; and the extract orders the tenant to remove on a charge of forty-eight hours; A.S., Jan. 27, 1830.

(h) *Hally v. Lang*, June 26, 1867, 5 Macph. 951; *Nisbet v. Aikman*, Jan. 12, 1866, 4 Macph. 284.

the natural possession ; but if he possessed by tenants, these tenants could not be disturbed in their possession till the next Whitsunday, that they might have time to look out for other farms, Craig, 270, 13 ; but they might be compelled to remove at that term, by an action of removing, without warning, *Thomson v. Merston*, Feb. 16, 1628, M. 8252.(i) In the case of a liferent-tack, no action of removing was, before the above-quoted Act S., Dec. 14, 1756, competent on the death of the tacksman against his representatives, without a previous warning, in terms of the Act 1555 (*L. Rowallan v. Boyd*, Feb. 13, 1630, M. 13,825); for in every case where the proprietor had granted a tack, warning was necessary.(j)

The land-  
lord's title in  
removing.

(51)

23. A landlord's title in a removing, let it be ever so lame, cannot be brought under question by a tenant whose tack flows immediately from him. But if he is to insist against tenants not his own,(k) his right must be perfected by infeftment, unless it be such as requires no infeftment, as terce, &c. The seisin itself is a sufficient title against tenants who cannot show a better ; but if the defender has a real right in the lands, the pursuer must also produce the relative charter. The seisin must be dated prior to the precept of warning, otherwise the precept will be null, as granted *a non habente potestatem* ; and consequently, the removing also, which is founded on it ; but if an heir should before entry warn a tenant to remove, his bare right of apparency will support the warning if he should serve heir, and infeft himself on his service prior to the citation in the subsequent action of removing ; *E. Haddington v. His Tenant*, July 28,

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(i) But a tenant who possesses on a lease during all the days of the granter's life must, after his death, be legally warned to remove ; *Johnstone's Trs.*, 1803, M. 15,207.

(j) "Where a liferent tenant dies, the landlord may at once enter to the possession, the heir or representative of the liferenter being entitled only to reap the crop on paying a proportion of the rent, and to be recompensed for labour in preparing the ground—the rule, as recognised in *Gordon v. Milne's Repr.*, Dec. 13, 1794, M. 13,851."—MOIR.

(k) That is, tenants to whom he himself did not let the lands, or, as in the Inst. l. c., "who derive their title from others."

1637, M. 3173.(l) If a proprietor is to move a tenant whose right is derived from one who has been in possession, he ought to make that person a party to the suit.

24. The defender in removing must, before offering any defence which is not instantly verified, give security to pay to the setter the violent profits, if they should be awarded against him; 1555, c. 39. These are so called, because the law considers the tenant's possession after the warning as violent. They are estimated, in tenements within borough, to double the rent; and in lands to the highest profits the pursuer could have made of them, by possessing them either by a tenant or by himself.(m) Violent profits. (54)

25. If the action of removing shall be passed from, or if the landlord shall, after using warning, accept of rent from the tenant for any term subsequent to that of the removal, he is presumed to have changed his mind, and tacit relocation takes place. All actions of removing against the principal or original tacksman, and decrees thereupon, if the order be used which is set forth *supra*, § 21, are, by the Act of Sederunt 1756, declared to be effectual against the assignees to the tack or sub-tenant.(n) Effect of warning not insisted in. (54, 55)  
Decrees of removal effectual against assignees.

26.(o) The landlord has in security of his tack-duty, over and above the tenant's personal obligation, a tacit pledge of hypothec, not only in the fruits, as he had by the Roman law (l. 6, *pr.*, in *quib. caus. pign. contr.*, 20, 2; l. 61, § 8, *de furt.* 47, 2), but in the cattle pasturing on the ground. The corn and other fruits are hypothecated for the rent of that year whereof they are the crop; Mackenzie, h. t., § 12; for which The landlord's hypothec on the fruits. (56-60)

(l) In *Mackintosh v. Munro*, Nov. 23, 1854, 17 D. 99, it was held enough if an heir possessing on apparenay was infest before decree in the removing.

(m) But if the tenant litigates in good faith, he will not be liable in violent profits until the final decree against him; *D. Buccleuch v. Hyslop*, March 10, 1824, 2 S. App. 54; *Carnegy v. Scott*, Dec. 4, 1827, 6 S. 206, 47 Dec. 9, 1830, 4 W. & S. 431; *Stirling v. Dunn*, Jan. 14, 1831, 9 S. 276.

(n) A sub-tenant may be removed at the end of the principal lease without calling the principal tenant; *D. of Queensberry v. Barker*, July 7, 1810, F.C.; but only if he has been recognised by the landlord; *Thomson v. Harvie*, Dec. 13, 1823, 2 S. 581.

(o) See *infra*, § 27, note.

acts,  
by  
action,

they remain affected, though the landlord should not use his right for years together; *Hay v. Keith*, July 25, 1623, M. 6188. In virtue of this hypothec, the landlord can (1) retain the corns upon the ground,<sup>(p)</sup> though a creditor of the tenant should have legal diligence ready to be executed against them by pointing. If the pointing be attempted before the term of payment of the tenant's rent, the landlord may stop it unless sufficient security be offered to him for that year's rent; *Crawford v. Stewart*, Jan. 21, 1737, M. 10,531, 6193. And if the tack-duty be payable in victual, the security must be offered for the tenant's specified delivery of the farm-bolls; *Hall v. Nisbet*, 1748, M. 6228. Though the pointer should leave corns on the ground sufficient for answering the rent, the landlord may stop the diligence; because what is so left may be destroyed or carried off before the term of payment, till which term the landlord cannot make it his own: but he is not at liberty to stop a creditor's pointing after the term, if sufficiency of corns be left for the rent, because he can instantly appropriate what is so left to his own payment.

or recovery of  
the corns,

(60)

27. This hypothec entitles the landlord (2) to recover all corns that are carried off from the tenant, either by legal diligence or voluntary purchase. Though a tenant who is liable in silver rent cannot well pay it but, by the sale of his corns, the landlord's right extends in practice even to that case: and our older decisions carried it still further against purchasers in public markets (*Hay v. Elliot*, March 29, 1631, M. 6219), contrary both to equity and public policy. Th

either *vid facti*,

landlord may bring back the corns without the authority a judge if he use his right *de recenti* (*Crichton v. E. Queerberry*, Dec. 11, 1672, M. 6203), unless where a creditor had made them his own by complete legal diligence; *Curry Crawford*, June 24, 1745, M. 6207. But in every case where the landlord has not exercised his right of recovery immediately he must make it good by a common process

or by a common  
action.

(p) Until the tenant find caution for his rent, even though he be alleged to be *vergens ad inopiam*; *Preston v. Gregor*, June 26, 7 D. 942.

(q) The landlord could vindicate the crop even against the

28. The whole cattle on the ground, considered as a quantity, are hypothecated for a year's rent, one after

Hypothec on cattle.

(61-63)

purchasers, unless sold in bulk in public market (*Dalhousie v. Dunlop & Co.*, Feb. 27, 1828, 6 S. 626, aff. 4. W. & S. 420); and even when ground into meal and sold in that form; *Barns v. Allan & Co.*, June 1, 1864, 2 D. 1119. By 30 & 31 Vict. c. 42, it was enacted (1) that corn *bonâ fide* purchased, delivered, removed, and paid for, or (2) *bonâ fide* purchased at a public auction after seven days' notice to the landlord, without sequestration having been obtained and registered, shall not be liable to hypothec (§ 3); that the right should cease unless sequestration has been commenced within three months after the rent has become due (§ 4); that the stock of a third party taken on to graze shall, so long as any portion of it remains on the farm, be subject to hypothec to the full amount of the grazing rent, but no more (§ 5); that the furniture and implements of agricultural tenants, manure, lime, tiles, &c., on the farm unused, are free, unless brought upon the land in fulfilment of a specific obligation in the lease (§ 6).

By 43 Vict. c. 12, it is enacted that after Nov. 11, 1881, except in regard to claims for rent under lease or bargain current at that date, the landlord's right of hypothec for the rent of land, including the rent of any buildings thereon, exceeding two acres in extent let for agriculture or pasture, shall cease. But the landlord is to have all other rights and remedies against his tenant when six months' rent is due and unpaid, as by the present laws when twelve months' rent is due and unpaid, and the same rights and remedies when twelve months' as he has now when two years' rent is due and unpaid (see *supra*, § 19). But the sheriff is not to entertain any action for caution and removing, or irritancy and removing, unless on fourteen days' notice by registered post letter or otherwise to the tenant that such action is intended, nor, in an action for caution and removing, to ordain the tenant to find caution for more than the arrears of rent and one year's rent further. This Act contains also the following important provisions: That in the event of removal or ejection under A. S. anent Removings, Dec. 14, 1751, and this Act, on account of being in arrear for six or twelve months, (1) the tenant is not to forfeit the rights of an outgoing tenant, to which he would have been entitled if the lease had naturally expired at the date of the removal or ejection, or at the last preceding term of Whitsunday or Martinmas, in the event of the removal or ejection taking place between these terms, in which last case (2) the tenant is to be entitled to credit or payment for the expenditure made by him since the last preceding term on labour, seed, and manure applied to any crop other than an away-going crop, falling within the immediately preceding provision; (3) provision is made for the adjustment of the rent to be paid on the removal, making it depend partly on the date of removal and partly on the benefit of the possession during the maturing of an away-going crop.

another successively. The landlord may apply this hypothec for payment of the past year's rent, at any time within three months from the last conventional term of payment (*Hepburn v. Richardson*, 1726), M. 6205, after which it ceases for that year. As the tenant may increase the subject of this hypothec, by purchasing oxen, sheep, &c., so he can impair it by selling part of his stock; but if the landlord suspects the tenant's management, he may, by sequestration or poinding, make his right, which was before general upon the whole stock, special upon every individual. A superior has also a hypothec for his feu-duty, of the same kind with that just explained; Mackenzie, h. t., § 12.

Hypothec on  
*invecta et  
illata.*

(64)

29. In tacks of houses, breweries, shops, and other tenements which have no natural(r) fruits, the furniture and other goods brought into the subject set (*invecta et illata*) are hypothecated to the landlord for one year's rent (*Dick v. Lands*, Dec. 7, 1630, M. 6243): but the tenant may by sale impair this hypothec, as he might that of cattle in rural tenements; and indeed, in the particular case of a shop, the tenant rents it for no other purpose than as a place of sale.(s)

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(r) With regard to furniture or other articles not belonging to the tenant himself, but hired from others, and placed in the house, "the decisions have gone very far, and are not easily reconcilable with the principle in the case of grass farms, that cattle sent to graze by strangers are not subject to the hypothec. But it is settled that when furniture of any kind is lent on hire it is subject to the hypothec, the lender being held to take his risk, and probably to make the hire proportioned to the risk; see Bell's Com. ii. 30 and 31, and such is also the law of England."—MOIR. It is not settled that furniture gratuitously lent is subject to the hypothec. It seems rather to be a question of circumstances; *Adam v. Sutherland*, Nov. 3, 1863, 2 Macph. 6.

(s) "From the operation of the hypothec in shops, &c., are exempted—(1) Goods sent to be manufactured or repaired, i.e., sent for a temporary or limited purpose, not involving the power of selling and receiving the price; (2) all goods sent on pledge, assuming the contract of pledge to be established; and (3) goods *in transitu*, of which the holder has the possession merely as the hand by which they are to be transferred on to another. The hypothec in regard to manufactories extends to the whole stock of manufactured goods, subject to the power of disposal and the protection of an onerous purchaser who has paid the price. In horticultural

### III. VII.—OF THE TRANSMISSION OF RIGHTS BY CONFIRMATION AND RESIGNATION.

1.(t) A vassal may transmit his feu either to universal successors, as heirs; or to singular successors, *i.e.*, those who acquire by gift, purchase, or other singular title. This last sort of transmission is either voluntary, by disposition; or necessary, by adjudication.

Transmission  
of feudal  
rights.

(1)

(5)

2. By the first feudal rules no superior could be compelled to receive any vassal in the lands other than the heir expressed in the investiture; for the superior alone had the power of ascertaining to what order of heirs the fee granted by himself was to descend; *Cleland v. L. Pitliver*, Feb. 24,

The vassal's  
power to transmit  
to a singular  
successor;

tural subjects it is doubtful whether the hypothec extends over shrubs and plants in a nursery garden; *Begbie v. Boyd*, Dec. 12, 1837, 16 S. 232. But Mr. Hunter ('Landlord and Tenant,' 4th ed. ii. 373) says that in practice the hypothec is admitted. A cautioner paying the rent is entitled to an assignation of the landlord's hypothec; and where sequestration has been used, he is entitled to the proceeds of the sale in preference to the landlord's hypothec for the next term. By sequestration the landlord's right is converted from a general hypothec into a specific pledge; and the sequestered effects may, by judicial authority, be sold, and the proceeds applied in payment of the rent. Sequestration may be applied for not only after the rent is due, but even *currente termino*, if the landlord has reason to doubt the solvency of the tenant."—MOIR.

"By 21 & 22 Vict. c. 26, long leases, under which are included leases of thirty-one years and upwards, and assignations or translations, but not leases of burgage subjects, may be registered in the Register of Sasines; and in virtue of such registration they are declared to be effectual against any singular successors in the lands whose infeftment is posterior in date to the registration. The lease, when recorded, may be assigned (§ 4) in security of borrowed money, or of provisions to wives or children, and the recording of the assignation in the same register completes the right. Failing payment of the capital sum for which the security is granted, or of a term's interest thereon, the creditor is entitled to enter into possession by warrant of the sheriff, and by § 20 he may bring the lease to sale for payment of the debt. All leases, assignations, &c., are to be preferable according to the dates of recording, § 12."—MOIR.

Registration of  
leases.

(f) Although rights cannot now be transmitted, either by confirmation or resignation, it is necessary that students should be acquainted with the methods.

- (6) 1685, M. 15,032. Hence Craig justly maintained, that no vassal could limit the descent of his feu to any new order of heirs, without the superior's consent, p. 344, § 20. But this right of refusal in the superior did not take place—(1) In the case of creditors-apprisers, or adjudgers, whom superiors were obliged to receive upon payment of a year's rent; 1469, c. 37; 1672, c. 19. (2) In the case of purchasers of bankrupt estates, who were put on the same footing with adjudgers, by 1681, c. 17, joined with 1690, c. 20. The crown refuses no voluntary disponee, on his paying a compensation to the Exchequer of a sixth part of the valued rent.

is now more  
absolute than  
formerly.

(7)

3. Notwithstanding the general rule above mentioned, indirect methods were in practice fallen upon to compel superiors to receive all singular successors; e.g., by a bond granted by the vassal disposing to the disponee, who thereupon adjudged the lands: and now, by 20 Geo. II. (for abolishing ward-holdings, §§ 12 and 13), the Legislature looking upon vassals as proprietors, and not merely as beneficiaries, has directed superiors to enter all singular successors who shall have got from the vassal a disposition containing procuratory of resignation, (a) they always receiving the fees or casualties that law entitles them to on a vassal's entry, i.e., a year's rent. (b) As this was enacted merely for the more expeditious making up of the titles of purchasers, without recurring to the former tedious methods, it does not seem to lay superiors under the necessity of entering incorporations, by which the whole casualties of superiority would be for ever lost to them. (c)

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(a) Not necessary under 31 & 32 Vict. c. 101, §§ 97, 100.

(b) See above, ii. 5, 22, note (x).

(c) A superior was not bound to enter an incorporation, *Hill v. Merchant Co. of Edinburgh*, Jan. 17, 1817, F.C. "It is generally stipulated that an agreed-on composition shall be paid at stated intervals—generally every twenty-five years. Where the superior had recognised the line of destination under an entail, under the Act 1685, c. 22, by giving an entry to the first heir, and had received the composition payable from a singular successor, he is not entitled (without an express stipulation to that effect) to demand a similar composition from succeeding substitutes who are not heirs of line of the predecessor; *Erskine's Inst.* ii. 7. 7; *Stirling v. Ewart*, Feb. 14, 1842, 4 D. 684, aff. 3 Bell's

4. Dispositions to be holden of the disposer are transmissions only of the property, the superiority remaining as formerly. This sort does not necessarily require a confirmation by the granter's superior, because his vassal continues the same, notwithstanding the subaltern right granted to the sub-vassal; but because the sub-vassal's property is exposed to the hazard of all the casualties falling by his immediate superior, where confirmation is not adhibited, it is commonly applied for; (d) and when granted, it secures against all such casualties as entirely carry off or exhaust the property, *e.g.*, forfeiture, recognition, &c.; but can hardly be explained into a renunciation by the superior of his other casualties arising from the nature of the feudal contract, which infer only a temporary right to the rents, or to any part thereof; Stair, ii. 3, § 28.

Base dispositions.

(8, 9)

Confirmations of base rights; their effects.

† 5. Base rights (ii. 3, § 8) had by our ancient law as strong effects as public; but as they might, before establishing the registers, have been kept quite concealed from all but granter and receiver, it was enacted for the security of purchasers, by 1540, c. 105, that whoever purchased lands on an onerous title, and attained possession thereof, should be preferred to persons claiming under a private right, though it should bear a date prior to his. Though the opposition runs by the words of the statute, between

Base rights postponed to public by our former law;

(10, 12)

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Ap. 128. See *M. of Hastings v. Oswald*, May 27, 1859, 21 D. 871; *Advocate General v. Swinton*, Nov. 14, 1854, 17 D. 21. The superior is entitled to refuse an entry as heir except by some form of deed which is not assignable, such as a precept of *clare constat*, which is personal to the heir, and will not warrant infeftment in favour of any other. He cannot be compelled to grant a charter, which the heir can assign, to the effect of entering a stranger as a vassal. If infeftment has once been taken by the vassal, any assignee deriving right from the party infeft must pay composition as a singular successor. If the heir of the last vassal who has granted a disposition to another party chooses to come forward and take an entry as heir in room of his ancestor, the superior cannot refuse to give such entry; *Hill v. Mackay*, Feb. 5, 1825, 2 S. 681; *Haig v. Forbes*, May 16, 1821, 1 S. 12; *Pigott v. Colville*, Dec. 9, 1829, 8 S. 213.—*Moir*. But see Conveyancing Act 1874, § 4, sub-sect. 2; and *Lamont v. Rankin's Tra.*, Feb. 28, 1879, 6 R. 739, aff. Feb. 27, 1880.

(d) Such confirmations are now obsolete.

onerous rights clothed with possession and. private rights, the act was so explained by custom, that an onerous and public right, whether followed by possession or not, was preferred to a private right not followed by possession. Where the base right came to be clothed with possession, it was esteemed effectual from that period; because the presumption of simulation, arising from its latency, was thereby taken off; and indeed, after the Act 1617, which ordained the registration of all deeds, private as well as public, the most slender acts of possession were admitted in support of the base right. As this distinction, which was no longer necessary after the establishment of our records, rendered the rights of lands extremely precarious, by frequently resting them on an uncertain proof by witnesses of the disponent's possession, all infeftments are, by 1693, c. 13, declared to be for the future preferable according to the date of their several registrations, without respect to the former distinctions of base and public, or of being clothed and not clothed with possession.

that distinction is now taken off.

Public rights.  
(13, 16)

6. Dispositions to be holden of the granter's superior may be perfected either by confirmation or resignation; and therefore they generally contain both precept of seisin and procuratory of resignation. When the receiver is to complete his right in the first way, he takes seisin upon the precept; but such seisin is ineffectual without the superior's confirmation, for the disponent cannot be deemed a vassal till the superior receive him as such, or confirm the holding. This confirmation used formerly to be adhibited by the superior upon the back of the charter or disposition granted by the vassal, but since the Acts imposing certain duties on deeds written upon stamped paper and parchment, is always written in a charter apart,<sup>(e)</sup> in which the superior recites at full length the charter confirmed, and then subjoins his own confirmation or ratification thereof. By the usual style in transmission of lands, the disposition contains an obligation

Confirmation of public rights.

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(e) Again under 31 & 32 Vict. c. 101, §§ 97, 98, and 32 & 33 Vict. c. 116, § 5, confirmation was given either by charter of confirmation or writ of confirmation written on the disposition, a title which all superiors were required to grant when asked.

and precept of infeftment, both *a me* and *de me*, in the option of the disponee, upon which, if seisin is taken indefinitely, it is construed, in favour of the disponee, to be a base infeftment, because a public right is null without confirmation. But if the receiver shall afterwards obtain the superior's confirmation, it is considered as if it had been from the beginning a public right. See *B. of Aberdeen v. Viscount Kenmure*, July 15, 1680, M. 3011.(g)

Seisin taken on a precept both *a me* and *de me*, how construed.

7. Where two several public rights of the same subject are confirmed by the superior, their preference is governed by the dates of the confirmations, not of the infeftments confirmed, because it is the confirmation which completes a public right. This was specially provided in the case of confirmations from the Crown by 1578, c. 66; but the reason of the rule holds in all confirmations, whether flowing from the Crown or a subject-superior; and therefore that statute must be considered merely as declaratory, and not as having introduced any new rule. In confirmations from the Crown, it is a charter first passing the seals that is preferred, because the seals are in place of the royal superscription (*L. Clackmannan v. E. of Wigton*, Feb. 26, 1680, M. 3029); unless he who has presented the first signature has been ob-

Confirmations of public rights, their preference.

(14)

Preferences in confirmations from the Crown.

(g) "But while a sasine, taken under a disposition containing an obligation to infeft both *a me* and *de me*, constitutes a valid base right in the person of the disponee, yet if the obligation to infeft appears to be limited to an *a me* holding, the infeftment following upon it will be worthless until confirmation, though the precept of sasine may be in itself conceived in the usual indefinite form; and the right of the disponee will be defeated by infeftment upon another conveyance, both *a me* and *de me*; *Rowand v. Campbell*, June 30, 1824, 3 S. 196; *Rowand v. Stevenson*, July 6, 1827, 5 S. 903, aff. July 14, 1830, 4 W. & S. 177; *Peebles v. Watson*, Dec. 2, 1825, 4 S. 290. Under modern forms many of these difficulties have vanished. The clause of obligation to infeft as well as the precept of sasine disappeared, and were replaced by a clause in terms like these: 'To be holden *a me* or *de me*.' By the Act of 1860, 23 & 24 Vict. c. 143, § 36 (see also 31 & 32 Vict. c. 101, § 6), it was provided that, where no manner of holding is expressed, the lands are to be considered as held *a me vel de me*, i.e., by both manners of holding where the investiture contains no prohibition against subinfeudation or against an alternative holding, and *a me* only where the investiture contains such prohibition."—MOIR.

structed in completing his right by the indirect methods or nimious diligence of his competitor; *Mill v. L. Powfoulis*, Dec. 6, 1678, M. 3028.(h)

Effect of confirmation.

(15)

8. Though a public right becomes, by the superior's confirmation,(i) valid from its date (Stair, ii. 3, § 28), yet if any mid-impediment intervene betwixt that period and the confirmation to hinder the two from being conjoined (*e.g.*, if the granter of a public right should afterwards grant a base right to another, upon which seisin is taken before the superior's confirmation of the first), the confirmation will have effect only from its own date, and consequently the base right first completed will carry the property of the lands preferably to the public one.(k)

Resignation *ad perpetuam remanentiam*;

(19-21)

9. Resignation is that form of law by which a vassal surrenders his feu to his superior; and it is either *ad perpetuam remanentiam* or *in favorem*. In resignations *ad remanentiam*, where the feu is resigned to the effect that it may remain with the superior, the superior, who before had the superiority, acquires by the resignation the property also of the lands resigned. And as his infeftment of the lands still subsisted, notwithstanding the right by which he had given his vassal the property, therefore, upon the vassal's resignation, the superior's right of property revives, and is consolidated with the superiority without the necessity of a new infeftment,

(h) Since 1858 sealing of Crown charters or writs is dispensed with unless the receivers require the appropriate seal to be appended, and the date of signing or of sealing is the date of the charter; 31 & 32 Vict. c. 101, § 78. See above, tit. v. § 39, note (l).

(i) "The confirmation validates the infeftment as from its date, with all deeds granted by the party infeft before the confirmation; *M'Dowall v. Hamilton*, 1793, M. 8807; *Lockhart v. Ferrier*, Nov. 16, 1837, 16 S. 76."—MOIR. "Every charter and writ, whether from the Crown or from a subject-superior, of whatever description, shall operate as a confirmation of the whole prior deeds and conveyances necessary to be confirmed in order to complete the investiture of the person obtaining such writ or charter;" 31 & 32 Vict. c. 101, § 115.

(k) "But the public right must, in the case supposed, carry the superiority;" Inst. l. c.; and a mid-superiority will be created.

Extinction of superiorities.

Facilities for extinguishing such mid-superiorities or other superiorities, by judicial or voluntary relinquishment, are provided in 31 & 32 Vict. c. 101, §§ 104-112, and in the Conveyancing Act, 1874, § 6.

so that resignations *ad remanentiam* are truly extinctions, not transmissions, of a right.<sup>(l)</sup> The property returns by <sup>how burdened.</sup> this resignation to the superior, with all the burdens charged upon it by the vassal which could have affected any singular successor, as feus, tacks, rights of annualrent, &c.; for the superior's voluntary accepting of the resignation from the vassal implies a confirmation of all these. The reason has been already given why it is otherwise when the fee returns to the superior in virtue of any feudal casualty; ii. 5, § 35. This sort of resignation was not ordained to be recorded by the Act 1617, for registering real rights, which omission, because it weakened the security of singular successors, is now supplied by 1669, c. 3.<sup>(m)</sup>

10. Resignations *in favorem* are made, not with an intention that the property resigned should remain with the superior, but that it should be again given by him in favour either of the resigner himself or of a third party: they have not therefore the effect, like resignations *ad remanentiam*, of divesting the resigner; for the surrender is not attended with any purpose, or *causa habilis* of transferring the property to the superior, but is only used as a step to convey it to an- <sup>Resignation in favorem, (22, 23, 18) does not divest the resigner till again by the resignatory.</sup>

(l) But without resignation *ad remanentiam* the two rights are not consolidated, but remain, though in the same person, distinct and separate rights; *Bald v. Buchanan*, 1786, M. 15,084, 2 Ross L.C. 210. If, however, there be forty years' possession on the superiority title, the base infeftment will be worked off, and the two fees consolidated by prescription; *L. Elibank v. Campbell*, Nov. 21, 1833, 12 S. 74; *Bontine v. Graham*, March 2, 1837, 15 S. 711, aff. August 6, 1840, 1 Rob. App. 347; *Dalrymple v. E. of Stair*, March 10, 1841, 3 D. 837; *E. of Zetland v. Glover Incorp. of Perth*, Jan. 29, 1868, 6 Macph. 292, aff. July 11, 1870, 8 Macph. (H.L.) 144.

Under the Conveyancing Act, § 6, no consolidation can take place without recording a minute in a form provided by the Act, and by § 7 consolidation is not to affect or extend the rights of any over-superior beyond what they were before the consolidation.

(m) After various changes in the forms of resignation *ad remanentiam*, the notarial instrument was rendered unnecessary, and it was made sufficient for superiors to record the procuratory or conveyance, with a warrant of registration, in the appropriate Register of Sasines, or to expedite a notarial instrument in a form prescribed; 31 & 32 Vict. c. 101, § 18.

Form of  
resignation.

(17, 18)

Resignation  
*propria  
manibus.*

(17)

Symbols of  
resignation  
within  
borough.

other; consequently the fee remains in the resigner till the person in whose favour the resignation is made gets his right from the superior perfected by seisin; Craig, 436, § 17:(n) and it is because resignations *in favorem* are but incomplete personal deeds, that our law has made no provision for recording them.(o) Hence the first seisin on a second resignation is preferable to the last seisin upon the first resignation; but the superior accepting a second resignation, whereupon a prior seisin may be taken in prejudice to the first resignatory, is liable in damages. In all resignations the vassal surrenders the lands by giving the symbol of staff and baton on his knee to the superior, who, in the case of a resignation *in favorem*, immediately delivers it to the disponent: and upon this fact a notarial instrument is extended, which completes the act of resignation. A pen is, in practice, used for a staff in the ceremony of resigning.(p)

11. Resignation may be made either by the vassal himself *propria manibus*, or by his procurator, in virtue of the procuratory or power to resign contained in the disposition. If the vassal resign *ad remanentiam propria manibus*, he himself, as well as the notary, must sign the instrument, (1555, c. 38); which statute is expressed in general terms, though it was perhaps intended to take place only where the resigner had subscribed no previous obligation or conveyance, that such resignation might not rest solely on the credit of the notary. Tenements within borough had been long resigned erroneously by the symbols of earth and stone, and such resignations were sustained in respect of the universal *communis error* (*Young v. Calderwood*, Feb. 7, 1708, M. 3105):

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(n) "And yet the lands are held as if in non-entry, the superior not being entitled to demand his feu-duties from a vassal from whom he has accepted a resignation, nor from the disponent who is not yet entered;" Bell's Pr. 802.

(o) Instruments of resignation, having long fallen into disuse, were abolished by 8 & 9 Vict. c. 35, § 9; see *Renton v. Anstruther*, Nov. 14, 1848, 11 D. 37.

(p) The ceremony of resignation was abolished by 10 & 11 Vict. c. 51, § 17, now 31 & 32 Vict. c. 101, § 80. In Crown writs, giving in the note applying for the Crown writ is made equivalent to resignation.

but by Act S., Feb. 11 that year, all symbols are prohibited in resignations other than staff and baton.

12. By statute 1594, c. 214, the necessity of producing procuratories or instruments of resignation, or precepts of seisin, is dispensed with where the rights and infeftments themselves have taken effect by possession for forty years together. Procuratories and precepts were in those days written separate from the dispositions on which they proceeded; and the view of the act was, that the validity of the infeftment should not depend upon the preserving of writings, which were considered as little worth the keeping; but now that the procuratory or precept is engrossed in the deed of alienation, and that tailzies are frequently executed by simple procuratories, such rights, if not supported by some separate deed divesting the granter, cannot stand on the footing of this act (though they may, in most cases, be supported by the posterior act of prescription, see iii. 7, § 2, 3) without production of the procuratories; because these are really the deeds of conveyance, which were not designed to fall under the statute. In burgage tenements, the instrument of seisin contains the whole transaction, without any separate instrument of resignation; and therefore, seisin, expressing resignation of these to have been made, constitutes a valid right, even before the lapse of forty years.(g)

The Act dispensing with the production of resignations.

(25)

13. By our former decisions, one who was vested with a personal right of lands (i.e., a right not completed by seisin), effectually divested himself by disposing it to another; after which no right remained in the disposer which could be carried by a second disposition, because a personal right is no more than a *jus obligationis*, which may be transferred by any deed sufficiently expressing the will of the granter.(r)

Transmissi-  
onal  
rights of land.

(26)

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(g) Burgage-holding has been abolished, and all titles assimilated to those in feu-holdings, and all that is required in place of the old instrument of sasine and recording is the recording of the conveyance or deed itself, with a warrant of registration thereon in the appropriate Register of Sasines; 31 & 32 Vict. c. 101, § 15; see *proviso* in §§ 81, 99.

(r) *Benton v. Anstruther*, Dec. 5, 1837, 15 S. 184, aff. Aug. 18, 1847, 2 Bell's App. 214. It is now transferred in the case of an unfeudalised disposition, i.e., one not recorded in the Register of Sasines, by an assign-

But this doctrine, at the same time that it rendered the security of the records extremely uncertain, was not truly applicable to such rights as required seisin to complete them; and therefore it now obtains that the granter of a personal right of lands is not so divested by conveying the right to one person, but that he may effectually make it over afterwards to another; and the preference between the two does not depend on the dates of the dispositions, but on the priority of the seisins following upon them; *Bell v. Gartshore*, June 21, 1737, M. 2848, 5 B. S. 198, 2 Ross, L. C. 410. See also *Neilson v. Murray*, Dec. 22, 1738, M. 7773.(s)

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TIT. VIII.—OF REDEEMABLE RIGHTS.

Redeemable  
rights contain-  
ing a reversion.

1. An heritable right is said to be redeemable when it contains a right of reversion, or return, in favour of the person from whom the right flows. Reversions are either legal, which arise from the law itself, as in adjudications, which law declares to be redeemable within a certain term after their date; or conventional, which are constituted by the

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nation in a statutory form written upon the deed itself, or separately; and the disposition and assignation, or a notarial instrument setting forth the right of the assignee, are recorded in the Register of Sasines to complete his title; 31 & 32 Vict. c. 101, §§ 22, 23, and 32 & 33 Vict. c. 116, § 2. As to the completion of a title derived from a deceased heir, neither infert nor served, but vested with a personal right in virtue of the Conveyancing Act, see § 10 of the Act.

(s) "This was strikingly exemplified in the late case of *Laurie v. Laurie*, March 10, 1854, 16 D. 860, in which a party had got a disposition of lands in 1796, but had never taken infertment on the disposition. The lands consequently remained feudally in the *hereditas* of the original seller, and descended to his heir, who became bankrupt and was sequestrated. The party holding the personal right attempted to adjudge the lands in implement after the sequestration. But it was held that, as the bankrupt at the date of sequestration held a completed feudal title to the subjects, the disponent under his mere personal obligation could not compete with the trustee holding a completed title to the lands by force of the sequestration."—MOIR.

agreement of parties, as in wadsets, rights of annualrent, and rights in security. A wadset (from wad or pledge) is a **Wadset.** right by which lands or other heritable subjects are impignorated by the proprietor to his creditor in security of his debt; and, like other heritable rights, is perfected by seisin. (3) The debtor who grants the wadset, and has the right of reversion, is called the reverser; and the creditor, receiver of the wadset, is called the wadsetter.

2. Wadsets were in the reign of David II. granted in the form of a charter, whereby the reverser impignorated to his creditor the lands therein mentioned, to be enjoyed by him until payment should be made of the sum lent; Skene, *voce* "Reversion." But a custom prevailed in the reign of James III. of executing these rights in the form of irredeemable dispositions; and the right of reversion was granted to the debtor in a separate writing. By this means, wadsetters who appeared from the face of their rights to be absolute proprietors had it in their power, by aliening the wadset lands, to defeat the reversion competent to the debtor: which being no more than a personal right, could only affect the wadsetter himself and his heirs, but not his singular successors. To obviate these frauds, all reversions were declared real rights, though granted in writings apart (1469, c. 28); but as the Act did not make their registration necessary in order to give them this effect, the rights of singular successors were rendered insecure, till 1617, c. 16, which ordains reversions in separate writings to be recorded in the same register with seisins, otherwise not to be effectual against singular successors. Wadsets, by the present practice, are commonly made out in the form of mutual contracts, in which one party sells the land, and the other grants the right of reversion. (4)

Reversions of wadsets,

made real,

(9)

if registered in the Register of Reversions.

(4)

3. Obligations to grant reversions, as well as reversions themselves, are directed by this Act to be recorded; these within sixty days after their date, and those within sixty days after the wadset is itself made real by seisin. An eik to a reversion is a writing signed by the reverser, acknowledging the receipt of a farther sum lent by the wadsetter, and declaring the wadset not redeemable till payment of the last (10)

Eiks to reversions must be registered.

Reversions in  
*gremio juris*  
need not be  
registered.

(12)

debt, as well as of the first. These, as burdens upon, and consequently parts of, the reversion, are also real rights if registered in terms of the statute. Reversions incorporated in the body of the wadset are excepted from this Act; because the singular successor in the wadset is in that case sufficiently certified of the reversion, though it be not registered, by looking into his own right, which bears it *in gremio*. Reversions of burgage tenements were, in like manner, excepted; but these are ordained also to be recorded by 1681, c. 11.

Reversions  
how far *stricti*  
*juris*.

(5-8)

4. Rights of reversion are generally esteemed *stricti juris*; yet they go to heirs, though heirs should not be mentioned, unless there be some clause in the right discovering the intention of parties that the reversion should be personal to the reverser himself; *E. Murray v. L. Grant*, Jan. 9, 1622, M. 10,322. In like manner, though the right should not express a power to redeem from the wadsetter's heir, as well as for himself, redemption will be competent against the heir; *Muir v. Muir*, Feb. 6, 1630, M. 10,339. All our lawyers have affirmed that reversions cannot be assigned unless they are taken to assignees; *Stair*, ii. 10, § 7; *Craig*, 224, § 3.(a) But it is certain that, from the favour of legal diligence, they may be adjudged.

Tack by the  
reverser to  
subsist after  
redemption.

(13)

5. Reversions were sometimes burdened with a power to the wadsetter to hold the lands in tack for a certain number of years after their redemption, for a tack-duty equal to the interest of the wadset sums, which was commonly far below the true rent of the lands. Such tacks are, by 1449, c. 18, declared null if the tack-duty be not in some degree proportioned to the rent. Reversions commonly leave the reverser at liberty to redeem the lands *quandocunque*, without restriction in point of time; but a clause is adjoined to some reversions that, if the debt be not paid against a determinate day, the right of reversion shall be irritated, and the lands shall become the irredeemable property of the wadsetter. Though this condition (*pactum legis commissoriae in pignoribus*) was reprobated by the Roman law as *contra bonos*

*Pactum legis*  
*commissoriae in*  
*pignoribus*.

(a) The author appears to disapprove of this doctrine; *Inst.* l. c. 7.

*mores* (l. ult. *C. de pact. pign.*; 8, 35), yet all irritant clauses in contracts, infeftments, and obligations are effectual with us, by Act S., Nov. 27, 1592; 1661, c. 62, § 14; nevertheless, where the irritancy is penal, as in wadsets, in which the sum lent falls always short of the value of the lands, the right of redemption is by indulgence continued to the reverser, even after the term has expired, while the irritancy is not declared. But the reverser, if he does not take the benefit of this indulgence within forty years after the lapse of the term, is cut out of it by prescription; *Pollock v. Storie*, Nov. 10, 1738, M. 7216, Elch. "Wadset," 4. How far it is effectual.

6. If the reverser would redeem his lands he must use an order of redemption against the wadsetter; the first step of which is premonition (or notice given under form of instrument) to the wadsetter, to appear at the time and place appointed by the reversion, then and there to receive payment of his debt, and thereupon to renounce his right of wadset. In the voluntary redemption of a right of wadset holden base it is usual to insert in the wadsetter's renunciation a procuratory of resignation in the hands of the superior, granter of the wadset, *ad remanentiam*; and to register the instrument taken thereupon in the Register of Reversions; but a renunciation by itself, if duly registered, re-establishes the reverser in the full right of the lands.<sup>(b)</sup> Where the wadset was granted to be holden of the granter's superior, letters of regress from the superior were necessary by our former law, by which he became bound again to receive the reverser, his old vassal, upon redemption of the lands; but now, since the Act 20 Geo. II. c. 50, the superior, though he has granted no such letters, must receive the reverser, on payment of a year's rent, if he produce a disposition from the wadsetter containing procuratory of resignation. If, at executing the wadset, the superior has granted letters of regress, Order of redemption.  
(17)  
Premonition.  
  
Voluntary redemption,  
how executed.  
(18)  
  
Letters of regress.

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(b) This is contrary to *Stair*, ii. 10, 13, and was held unsettled in *Wauchops v. D. Roxburgh*, Dec. 14, 1815, F.C., aff. March 9, 1825, 1 W. & S. 41; see *Chisholm v. Chisholm-Batten*, Dec. 9, 1864, 3 Macph. 202. The provisions of 31 & 32 Vict. c. 101, §§ 132, 134, may perhaps be held to apply to wadsets; see *ib.* § 3 (interpretation clause "Heritable Securities"), see below, p. 223, note (g).

he will be obliged to receive him without payment of the year's rent. Letters of regress are not effectual against singular successors in the superiority if they are not registered in the Register of Reversions. All wadsets that remain personal rights are extinguished by simple discharges, though they should not be recorded.

Consignation  
of the redemp-  
tion-money ;

(19)

7. If the wadsetter either does not appear at the time and place appointed, or refuses the redemption-money, the reverser must consign it under form of instrument, in the hands of the person thereto appointed in the right of reversion ; or, if no person be named, in the hands of the clerk to the bills, of a clerk of Session, or any responsal person. An instrument of consignation, though it proves that the proper solemnities were used, yet, being but the assertion of a notary, cannot fix the receipt of consigned money upon the consignatory without an acknowledgment subscribed by himself. Extrinsic bonds due by the wadsetter to the reverser cannot be consigned in place of the sums contained in the right of wadset ; for compensation is excluded by the reversion itself, which requires consignation in current money. But where the compensation is founded on an article contained in the wadset right, it will be received ; *Hodge v. Hodge*, Jan. 2, 1667, M. 13,464. This instrument of consignation completes the order of redemption, stops the farther currency of interest against the reverser, and founds him in an action(c) for declaring the order to be formal, and the lands to be redeemed in consequence of it.

its effects.

Declarators of  
redemption.

(20, 21)

8. Declarators of redemption are not competent to the reverser's apparent heir ; for an heir before entry has no title to sue on the rights of his ancestor (*Lord Lovat v. L. Macdonald*, Jan. 19, 1672, M. 13,278) ; (d) but they may be insisted in against the wadsetter's apparent heir ; because, in choosing a defender, no more is necessary than that he have an inter-

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(c) But this action of declarator is competent without notice or consignation ; *Campbell v. Campbell*, 1786, M. 16,552, Hailes 993.

(d) But see Inst. l. c., Lord Ivory's note ; *M'Andrew v. Reid, &c.*, July 16, 1868, 6 Macph. 1064. A creditor whose debt is a real burden on the reversion has a title to sue a declarator of extinction of a wadset ; *Wright v. Turner*, March 7, 1855, 17 D. 629.

est to oppose the suit; yet such heir is not entitled to the redemption-money, though the lands should be found redeemed, till he completes his titles, and so be capable of reinstating the reverser in the lands; *Campbell v. Bryson*, Jan. 10, 1665, M. 16,521.

9. Though a right of reversion, which is barely a faculty to redeem, is said not to be assignable without special powers,<sup>(e)</sup> yet an order of redemption used upon it may be made over to another; because the faculty is, by the order, converted into an established right; the deposited money may doubtless be assigned, and of course the assignee must be entitled to prosecute the redemption. The Act 1617, which requires the registration of grants of redemption and renunciations, does not make it necessary to register orders of redemption, though these, joined with the decrees of declarator following upon them, are truly legal renunciations, and evacuate the right of wadset, even in questions with singular successors; Mack. Obs. on 1617, c. 16.

Orders of redemption may be assigned;

(8, 24)

but need not be registered.

10. After decree of declarator is obtained, by which the lands are declared to return to the debtor, the consigned money, which comes in place of the lands, becomes the wadsetter's, who therefore can charge the consignatory, upon letters of horning, to deliver it up to him; but because the reverser may at any time before decree pass from his order, as one may do from any other step of diligence, the consigned sums continue to belong to the reverser till that period; and consequently the wadsetter's interest in the wadset continues heritable.<sup>(g)</sup> If, therefore, decree is not obtained till after the death of the wadsetter, the redemption-money will belong to the wadsetter's heir, and not to his executors; but the moment the lands are declared redeemed by the decree it

Till what period does the consigned money belong to the reverser?

(23)

(e) See above, p. 220, note (a). The contrary view is maintained against some early cases in Inst. ii. 8, 7, 8, c.f. 15; Ross's Lectures, ii. 354.

(g) Wadsets are not specified among the heritable securities whose quality is affected by 31 & 32 Vict. c. 101, § 117, and it may be doubted whether they are within the intention of that Act. See above, p. 221, note (b).

becomes moveable,<sup>(h)</sup> because it can be no longer said to be secured on land.

Instrument of  
requisition;  
(25)  
its effects;

it may be  
passed from.

Wadset  
proper;  
(26, 27)

improper;  
(28)

11. If the wadsetter chooses to have his money rather than the lands, he must require from the reverser, under form of instrument, the sums due by the wadset, in terms of the right. This instrument of requisition did, by the former law, dissolve the real right constituted by the wadset, and consequently made the sums contained in it moveable (ii. 2, § 9); but now that provision is generally made by a special clause in the right, that no diligence to be used upon it shall weaken the real security, the wadset sums by our present law continue heritable, notwithstanding requisition. It has been adjudged that requisition may be passed from by the wadsetter, even after the reverser has consigned the redemption-money in consequence thereof; *Ross v. Ross*, Nov. 14, 1710, M. 14,099.<sup>(i)</sup>

12. Wadsets are either proper or improper. A proper wadset is that whereby it is agreed that the use of the lands shall go for the use of the money; so that the wadsetter takes his hazard of the rents, and enjoys them without accounting, in satisfaction or *in solutum* of his interest. Though, therefore, the rent of the lands should be less than the yearly interest of the sum lent, the lands are redeemable upon payment of the bare principal sum, without any claim for bygone interest; if it amounts to more, the wadsetter is not obliged to impute the surplus (*in sortem*) towards the extinction of the principal sum. Where the wadsetter thus subjects himself to all the chances by which the fruits may be lost, it is a proper wadset, though the reverser should be obliged to pay the public burdens; *Home v. Stewart*, 1677, M. 16,414; *Dowie v. Cunningham*, 1685, M. 16,417. See 1661, c. 62, §§ 13, 14.

13. In an improper wadset, the reverser, if the rent should fall short of the interest, is taken bound to make up the deficiency; if it amounts to more, the wadsetter is

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<sup>(h)</sup> And is attachable by arrestment; *Stormonth v. Robertson*, May 24, 1814, F.C.

<sup>(i)</sup> The author appears to doubt this decision; Inst. l. c.

obliged to impute the excrescence towards extinction of the capital; and as soon as the whole sums, principal and interest, are extinguished by the wadsetter's possession, he may be compelled to renounce, or divest himself in favour of the reverser. Where the wadsetter, in place of possessing by himself, grants a back-tack of the lands to the reverser for payment of the interest of the wadset sums, as the tack-duty, the wadset is thereby rendered improper; for the wadsetter has, in that event, no chance of getting more than his interest; and consequently the redemption is burdened, not only with the payment of the principal sum, but of the interest or tack-duties remaining unpaid. But this burden is ineffectual against singular successors if it be not expressed in the right of reversion, or if the back-tack be not recorded in the proper register.

14. If the wadsetter be entitled by his right to enjoy the rents without accounting, and if, at the same time, the reverser be subjected to the hazard of their deficiency, such contract is justly declared usurious, by 1661, c. 62: for where the wadsetter runs no risk of losing any part of his interest he should have no chance of drawing more. By another clause in the same Act it was provided that in proper wadsets granted before the date of the statute, wherein unreasonable advantages had been taken of the debtor, the wadsetter should, during the not requisition of the sum lent, be obliged either to quit his possession to the debtor, upon his giving security to pay the interest, or to subject himself to account for the surplus rents, as in improper wadsets. This branch of the statute appears, both from its narrative and the enacting words, to be limited to such wadsets as were granted anterior to the statute; but the subsequent practice has extended it to all wadsets without distinction. Either the reverser himself, or any in his right, *e.g.*, a disponee or adjudger, is entitled to make offer of security to the wadsetter, in terms of this statute; but the reverser's personal creditors have no such privilege, since their debts are no titles of possession; *E. Leven v. Morison*, Feb. 17, 1830, M. 12,502.

usurious  
wadsets.

(26)

A proper wad-  
setter must  
quit possession  
on the rever-  
ser's giving  
security.

(29)

The reverser's  
personal credi-  
tors cannot  
offer security.

15. Infestments of annualrent, the nature of which has

Right of  
annualrent;  
(31, 32)

poinding of  
the ground is  
competent  
upon it;

and likewise a  
personal action  
against the  
tenants.

been explained (ii. 2, § 3), are also redeemable rights. A right of annualrent does not carry the property of the lands, but it creates a real *nexus* or burden upon the property, for payment of the interest or annual rent contained in the right; and consequently, the bygone interests due upon it are *debita fundi*. The annualrenter may therefore insist in a real action for obtaining letters of poinding the ground, upon which he may distrain the corns, cattle, or other moveables upon the lands, for payment of his interest. Those corns, &c., in so far as they are the property of the debtor himself, may be poinded by the creditor to the full amount of the debt due to him; but the goods belonging to the debtor's tenant can be poinded only to the extent of the rent due by him to his landlord, as shall be particularly explained (iv. 1, § 8), to which extent the annualrenter may, if he pleases, sue the tenant in a personal action, towards the payment of his past interest; and in a competition for those rents the annualrenter's preference will not depend on his having used a poinding of the ground, for his right was completed by the seisin; and the power of poinding the ground, arising from the antecedent right, is *meræ facultatis*, and need not be exercised if payment can be otherwise got; *Kelhead v. Wallace*, 1748, M. 2785. As it is only the interest of the sum lent which is a burden upon the lands, the annualrenter, if he wants his principal sum, cannot recover it either by poinding or by a personal action against the debtor's tenants, but must demand it from the debtor himself, on his personal obligation in the bond, either by requisition or by a charge upon letters of horning, according as the right is drawn.

Extinction of  
rights of  
annualrent.

(34)

16. Rights of annualrent being servitudes upon the property, and consequently consistent with the right of property in the debtor, may be extinguished without resignation. Where they were made out after the old style (ii. 2, § 3) formal renunciations were necessary, which it behoved the debtor to record in the Register of Reversions, because such rights were truly wadsets: but when rights of annualrent came, by a variation in the form, to be accessory to a personal obligation, which is extinguishable merely by payment

or intromission, renunciations were no longer required to the extinction of them; see *Rankin v. Arnot*, July 8, 1680, M. 572.(k)

17. Infeftments in security are another kind of redeemable right (now frequently used in place of rights of annual-rent), by which the receivers are infeft in the lands themselves (and not simply in an annualrent forth of them), for security of the principal sums, interest, and penalty, contained in the rights.(l) These rights, when they are granted, not to the creditors for payment of their debts, but to cautioners for relief of their engagement, are called infeftments of relief. If an infeftment in security be granted to a creditor, he may thereupon enter into the immediate possession of the lands or annualrent for his payment; whereas rights of relief are conditional, and have no operation till the cautioner either pays the debt or is distressed for it, except in the special cases mentioned; iii. 3, § 26. Infeftments of relief are granted, not for the behoof of the creditor, who is no party to the right, but for the cautioner's, who therefore may renounce it at his pleasure; *Crs. of Langton*, 1691, M. 33; but if the creditor, by adjudging the right of relief from the cautioner, shall carry it to himself, the cautioner cannot thereafter renounce it in prejudice of him who has affected it by legal diligence. Where a right of security is granted, either for payment or for relief, not only of debts already contracted but to be contracted by the granter, its effects, as to future contractions, is restricted to the debts that shall be contracted prior to the date of the seisin following on it, by 1696, c. 5. This was enacted because such se-

Rights of security.

(35, 36)

Infeftments of relief,

have no present effect,

may be renounced in prejudice of the creditor.

Security for debts to be contracted, how limited.

(k) See Ross's Lectures, ii. 390. The doctrine here stated has been questioned.

(l) The bond and disposition in security is the form now almost universally used for constituting ordinary securities upon land. A form is provided in the Titles to Land Act, 1868, Schedule FF; as to the meaning of its terms, see § 118. Infeftment is taken by registration of the deed itself in the appropriate Register of Sasines, and this may be done in the case of heritable securities in any other form; 31 & 32 Vict. c. 101, § 134.

Bond and Disposition in Security.

curities were found by experience to be frequently granted<sup>(n)</sup> as covers to fraud. Infeftments in security are extinguished as rights of annualrent.<sup>(o)</sup>

Preference of  
*debita fundi.*

(37)

18. All rents of annualrent, rights in security, and generally whatever constitutes a real burden on the fee, may be ground of an adjudication which is preferable to all adjudications or other diligences intervening between the date of the right and of the adjudications deduced on it; not only for the principal sum contained in the right, but also for the whole past interest contained in the adjudication. This preference arises from the nature of real debts, or *debita fundi*, and is expressly reserved by the Act 1661, c. 62, establishing the *pari passu* preference of adjudications; but in order to obtain it for the interest of the interest accumulated in the adjudication, such adjudication must proceed on a process of poinding the ground; *Mackenzie v. Cockburn's Crs.*, 1699, M. 259.

Cash Credit  
Bonds.

(n) But by the 54 Geo. III. c. 137, § 14, renewed by 19 & 20 Vict. c. 91, § 7, it is enacted that heritable securities, granted either to bankers or other persons for cash accounts or credits, or to the cautioners in such accounts or credits by way of relief, shall form an exception to the rule laid down by the Act 1696, c. 5, as to debts contracted after the date of the seisin. "Such securities are valid on condition that the principal sum and interest to become due under the bond, not exceeding the principal sum and *three* years' interest, shall be fixed by the bond. But the effect of the Act 1696 may be practically evaded by the debtor's granting an absolute conveyance of the lands, as if under a sale, which is qualified by a separate obligation or back-bond granted by the creditor obliging himself to denude, but only on payment of the debt which may be then due, or of any debt which may be subsequently contracted by future advances to the debtor. If this back-bond remains unrecorded, the lands would, in the event of bankruptcy, pass to the trustee of the holder of the conveyance; if recorded, it qualifies the absolute right. But, in any view, the conveyance covers all advances and debts, whether before or after the sasine; because the personal obligation to denude cannot be enforced against the creditor except under the condition stipulated."—*MORR.* See also 31 & 32 Vict. c. 101, § 134.

(o) Heritable securities are now limited or extinguished by deeds of restriction or discharge, for which statutory forms are provided, and which must be recorded in the appropriate Register of Sasines; 31 & 32 Vict. c. 101, §§ 132, 133.

## TIT. IX.—OF SERVITUDES.

1. Servitude is a burden affecting lands, or other heritable subjects, whereby the proprietor is either restrained from the full use of what is his own,<sup>(a)</sup> or is obliged to suffer another to do something upon it. Servitudes are either natural, legal, or conventional. Nature itself may be said to constitute a servitude upon inferior tenements, whereby they must receive the water that falls from those that stand on higher ground. Legal servitudes are established by statute or custom, from considerations of public policy; among which may be numbered the restraints laid upon the proprietors of tenements within the city of Edinburgh, by 1621, c. 26, and 1698, c. 8. There is as great variety of conventional servitudes as there are ways by which the exercise of property may be restrained by paction, in favour of another.<sup>(b)</sup>

2. Conventional servitudes are constituted either by grant, where the will of the party burdened is expressed in writing, or by prescription, where his consent is presumed from his acquiescence in the burden for forty years. A servitude constituted by writing or grant is not effectual against the grantor's singular successors unless the grantee has been in the use or exercise of his right, which, in vulgar speech, is called possession, though improperly; for servitudes are in-

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(a) These are sometimes called negative and positive servitudes, Inst. l. c.

(b) New kinds of servitude are not readily admitted, the rule being that this burden, being effectual when properly constituted against singular successors, though not followed by infestment, should be "limited to such uses or restraints as are well established and defined, leaving others as mere personal agreements;" Bell's Pr. 979. This limitation is strictly observed in regard to negative servitudes; *ib.* 990. "The law of Scotland does not acknowledge as servitudes the right of trout-fishing, though exercised from a public pathway running along the banks of a river (*Sheriff v. Ferguson*, July 18, 1844, 6 D. 1363); nor a *jus spatiandi* over another man's grounds, except where a pathway crosses these grounds communicating from one public road to another (*Dyce v. Hay*, 11 D. 1266,

corporeal rights, affecting the property of another, few of which are capable of proper possession. They are valid against the grantor and his heirs, even without use. In servitudes that may be acquired by prescription, forty years' exercise of the right is sufficient, without any title in writing, other than a charter and seisin of the lands to which the servitude is claimed to be due.(d)

Difference be-  
twixt the two.

(4)

3. Servitudes constituted by grant are not effectual in a question with the superior of the tenement burdened with the servitude, unless his consent be adhibited; for a superior cannot be hurt by his vassal's deed; but where the servitude is acquired by prescription, the consent of the superior, whose right afforded him a good title to interrupt, is implied. A servitude by grant, though followed only by a partial possession, must be governed, as to its extent, by the tenor of the grant; but a servitude by prescription is limited by the measure or degree of the use had by him who prescribes, agreeably to the maxim, *tantum præscriptum, quantum possessum*.(e)

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aff. May 28, 1852, 24 Jur. 465, 1 Stuart 783); nor a servitude of curling and skating on a loch within private grounds; *Harvey v. Lindsay*, June 23, 1853, 15 D. 768. It is not easy, however, to draw a distinction between these and other cases where the servitude has been sustained; as in *Dempster v. Cleghorn*, H. of L., Nov. 16, 1813, 2 Dow 242, where a servitude of playing golf was sustained; and again in the *Mags. of Earlsferry v. Malcolm*, June 12, 1829, 7 S. 755. A servitude of bleaching and drying clothes was admitted; *Sinclair v. Mags. of Dysart*, Feb. 10, 1799, M. 14,549, aff. March 8, 1780, 2 Pat. 554."—MOIR.

(d) A servitude acquired by prescription is not lost by subsequent interruptions which do not amount to a contrary prescription; *Rodgers v. Harvie*, July 10, 1827, 5 S. 917, aff. July 8, 1828, 3 W. & S. 251. A servitude over adjoining lands may be so acquired even where the title is a "bounding" charter; *Baumont v. L. Glenlyon*, July 11, 1843, 5 D. 1337. Negative servitudes cannot be constituted by prescription, but require writing, which must be unequivocal in its terms, but may be unrecorded; *Gray v. Ferguson*, 1792, M. 14,513; *Leck v. Chalmers*, Feb. 3, 1859, 21 D. 408; *Cowan v. Stewart*, May 24, 1875, 10 Macph. 723, Inst. ii. 9, 35.

(e) But a servitude once acquired by prescription may be extended beyond former usage, if otherwise the servitude would be ineffectual and useless to the dominant tenement; Inst. l. c.; see Lord Ivory's doubt, note 185. See *Mackenzie*, 19 June, 1868, 6 Macph. 936.

4. Servitudes are either predial (sometimes called real) <sup>Predial servitude.</sup> or personal. Predial servitudes are burdens imposed upon one tenement in favour of another tenement. That to which the servitude is due is called the dominant, and that which owes it is called the servient tenement. No person can have right to a predial servitude if he is not proprietor of some dominant tenement that may have benefit by it; for that right is annexed to a tenement, and so cannot pass from one person to another, unless some tenement goes along with it. (5)

5. Predial servitudes are divided into rural servitudes, or <sup>Rural servitude, or of lands.</sup> of lands; and urban servitudes, or of houses. The rural servitudes of the Romans were, *iter*, *actus*, *via*, *aquæductus*, *aquæhaustus*, and *jus pascendi pecoris*. Similar servitudes may be constituted with us,—of a foot-road, horse-road, cart-road, dams and aqueducts, watering of cattle, and pasturage. (6, 12)

The right of a highway is not a servitude constituted in favour of a particular tenement, but is a right common to all travellers.(g) The care of highways, bridges, and ferries is committed to the Sheriffs, Justices of Peace, and Commissioners of Supply in each shire; 1669, c. 16; 1670, c. 9; 1686, c. 8; 5 Geo. I. c. 30.(h)

6. Common pasturage, or the right of feeding one's cattle <sup>Common pasturage,</sup> upon the property of another, is sometimes constituted by a general clause of pasturage in a charter or disposition, without mentioning the lands burdened, in which case the right comprehends whatever had been formerly appropriated to the lands disposed out of the grantor's own property, and likewise all pasturage due to them out of other lands.(i) <sup>what it comprehends.</sup> (14, 15)

(g) And it may be vindicated by any one of the public; *Torrie, &c. v. D. of Atholl*, Dec. 12, 1849, 11 D. 328, aff. June 4, 1852, 1 Macq. 55.

(h) The public roads of Scotland have been from time to time regulated by a multiplicity of local Acts. The general regulating Act now in force is 41 & 42 Vict. c. 51. The care of roads is committed to trustees, consisting partly of commissioners of supply and partly of elected trustees.

(i) The right of pasturage belonging to one farm is not available to the cattle of another belonging to the same tenant (*Stewart v. Caithness*, and *Stewart v. Smart*, 1788, Hume 731); and it gives no right of killing game (*Forbes v. Anderson*, Feb. 1, 1809, F.C.), or of cutting hay on the servient tenement; *Cunningham v. Dunlop*, Dec. 29, 1836, 15 S. 295. It is mate-

When a right of pasturage is given to several neighbouring proprietors on a moor or common belonging to the granter, indefinite as to the number of cattle to be pastured, the extent of their several rights is to be proportioned according to the number that each of them can fodder in winter upon his own dominant tenement, which proportions may be fixed by an action of souming and rouming, two old words signifying the form of law by which the number of cattle that each proprietor may pasture upon the moor is ascertained.

Urban servitudes, or houses.

(7, 8)

7. The chief servitudes of houses among the Romans were those of support, viz., *tigni immittendi* and *oneris ferendi*. The first was the right of fixing in our neighbour's walls a joist or beam from our house; the second was that of resting the weight of one's house upon his neighbour's wall; l. 33, *de serv. præd. urb.* (8, 2). In this last, he who owed the servitude was bound, not only to suffer the house to rest on his wall, but to repair the wall when it became unfit for supporting that weight, d. l. 33; not from the nature of servitude, which laid the servient tenement under no obligation to do, but merely to suffer, but in virtue of an express stipulation in the right; l. 6, § 2 *si serv. vind.* (8, 5). By our customs, also, the owner of the servient tenement is not obliged, in a servitude of support, to repair it, unless the servitude be expressly so constituted; Stair, ii. 7, § 6; *Murray v. Brownhill*, 1715, M. 14,521.(k)

Obligations on different owners of the same tenement of houses.

(11)

8. Where different floors or storeys of the same house belong to different persons, as is frequent in the city of Edinburgh, the property of the house cannot be said to be entirely divided; the roof remains a common roof to the whole, and the area on which the house stands supports the whole, so that there is a communication of property, in consequence of which the proprietor of the ground-floor must, without the constitution of any servitude, uphold it for the

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rially different from a right of property in a common, and does not, for instance, give a right to sue a process of division of commonity; *Gordon v. Grant*, Nov. 12, 1850, 13 D. 1; Bell's Pr. 1095.

(k) *Young v. Cuddie*, Feb. 24, 1831, 9 S. 500.

support of the upper, and the owner of the highest storey must uphold that as a cover to the lower. Where the highest floor is divided into garrets among the several proprietors, each proprietor is obliged, according to this rule, to uphold that part of the roof which covers his own garret; Stair, ii. 7, § 6.(l)

9. No proprietor can build so as to throw the rain-water *Stillicide*. falling from his own house immediately upon his neighbour's ground, without a special servitude, which is called of *stillicide*; but if it falls within his own property, though at the smallest distance from the march, the owner of the inferior tenement must receive it. The Romans, to prevent the inconveniency of building too near a neighbour's property, obliged proprietors to keep within a certain distance of their own march; l. 14, *de serv. præd. urb.* (8, 2): but we have no statute regulating this matter, though, by the usage of several (9)

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(l) The nature of the rights of the proprietors of "lands" of houses is not in all points settled. Each proprietor has a right of property in the walls surrounding his own separate house; and beyond this the character and extent of his rights seems to depend both on his titles and on the original construction of the whole tenement. Each proprietor has an interest in the *solum*, the gable, and in the common stair and walls enclosing it, which entitles him to prevent any alteration upon these that may affect the safety, or even the use and enjoyment of his separate estate; see Bell's Pr. 1075, 1086; *Stewart v. Blackwood*, Feb. 3, 1829, 7 S. 362; *Graham v. Greig*, Dec. 6, 1838, 1 D. 171; *Anderson v. Saunders*, March 9, 1831, 9 S. 564; *Gellatly v. Arrol*, March 13, 1863, 1 Macph. 592. Professor Moir says, with regard to the last cited case, "it was found that where the several storeys of a house belong to different proprietors, each proprietor has a right in the walls from top to bottom, and can prevent the operations of a proprietor above him, though he is merely striking a door through on the floor belonging to himself. If this case proceeded on the principle that the under-proprietor had reason to believe that some prejudice would really arise to his own floor by the act of the proprietor above him, the case is quite intelligible; but if it be supposed to establish the principle that without any foundation for reasonable apprehension an under-proprietor has a right of common property in the whole gable, so as to entitle him to object to any operation on the wall, however innocuous (which seems to be the view of the case taken in some quarters), it seems contrary to the doctrine laid down by Mr. Bell, Prin. § 1086."—MOIR.

boroughs, proprietors are obliged to build some inches within the extremity of their property.(m)

Servitudes  
altius non tol-  
lendi, et non  
officiendi  
luminibus.

(10)

10. The servitudes, *altius non tollendi, et non officendi luminibus vel prospectui*, restrain proprietors from raising their houses beyond a certain height, or from making any building whatsoever that may hurt the light or prospect of the dominant tenement; L. 4, 15, *de serv. præd. urb.* (8, 2). These servitudes cannot be constituted by prescription alone; for though a proprietor should have built his house ever so low, or should not have built at all upon his grounds for forty years together, he is presumed to have done so for his own convenience and profit; and therefore cannot be barred from afterwards building a house on his property, or raising it to what height he pleases, unless he be tied down by his own consent.(n)

Servitude of  
feal and divot.

(17)

11. We have two predial servitudes to which the Romans were strangers, viz., that of fuel, or feal and divot, and of thirlage; the first is a right by which the owner of the dominant tenement may turn up peats, turfs, feals, or divots, from the ground of the servient, and carry them off either for fuel, thatch, or the other uses of his own tenement.(o) Common pasturage, though a greater servitude than that of feal and divot, does not necessarily comprehend the lesser

Feal and divot  
not always  
comprehended  
under pastur-  
age.

(m) It sometimes becomes difficult to distinguish whether an eaves-drop arises from a right of property or of servitude; see *Scouller v. Pollock*, Jan. 24, 1832, 10 S. 241; *Jack v. Lyall*, April 1, 1835, 1 S. & M'L. 77.

(n) *Walker v. Wishart*, July 7, 1825, 4 S. 148; *Morris v. M'Kean*, Feb. 19, 1830, 8 S. 564. Restrictions upon building in towns are sometimes effected by means of feuing plans, referred to in the titles, and made conditions of the feuar's rights; see *Gordon v. Marjoribanks*, March 2, 1818, 6 Pat. App. 351; *Young v. Dewar*, Nov. 17, 1814, F.C.; *Walker v. Renton*, March 11, 1825, 3 S. 650; *Boswell v. Inglis*, May 1, 1849, 6 Bell's App. 427; *M'Neill v. Mackenzie*, Feb. 5, 1870, 8 Macph. 52; Bell's Pr. 868.

(o) It must, like other servitudes, be confined to the ordinary domestic uses of the dominant tenement, and not communicated to others; *Brown v. Kinloch*, 1775, M. 14,542; *Leslie v. Cumming*, 1793, *ib.*; *Carstairs v. Brown*, May 14, 1829, 7 S. 607. So held also in regard to the analogous servitude of casting and winning slate and stone; *Murray v. Mags. of Peebles*, Dec. 8, 1808, F.C.; *Keith v. Stonehaven Comrs.*, Feb. 12, 1829, 7 S. 405, aff. 5 W. & S. 234; *infra*, § 20.

under it; for the two servitudes are quite distinct, and the greater can be used without the lesser. The right, therefore, of casting feal will be excluded if he who is entitled to the pasturage has never attempted to use the other right, or was interrupted in the attempt; *L. Haining v. Selkirk*, Feb. 15, 1668, M. 2459.

12. *Thirlage* is that servitude by which lands are astricted, *Thirlage*; or thirled, to a peculiar mill, and the possessors bound to grind their grain there, for payment of certain multures and sequels, as the agreed price of grinding. In this servitude the mill is the dominant tenement, and the lands astricted (which are called also the thirle or sucken) the servient. Multure is the quantity of grain or meal payable to the proprietor of the mill, or to the multurer his tacksman. The sequels are the small quantities given to the servants, under the names of knaveship, bannock, and lock or gowpen. The quantities paid to the mill by the lands not astricted are generally proportioned to the value of the labour, and are called out-town or out-sucken multures; but those paid by the thirle are ordinarily higher, and are called in-town or in-sucken multures. (18, 19)

13. *Thirlage* may be constituted by a landholder when, in the disposition of certain lands, he astricts them to his own mill; or when, in the disposition of a mill, he astricts his own lands to the mill disposed; and sometimes he thirls his tenants to his own mill by an act or regulation of his own court; which, however, cannot be binding on such tenants as do not oblige themselves to comply with it; for tenants cannot, but by their own consent, be subjected to any burden not mentioned in their tacks. The grant of a mill with the general clause of multures, without specifying the lands astricted, conveys the thirlage of all the lands formerly astricted to that mill, whether they were the property of the grantor, or of a third party. *Thirlage, how constituted.* (21)

14. A less formal constitution serves to astrict barony-lands to the mill of the barony, than is necessary in any other thirlage; which perhaps proceeds from the effects of the union between the two. Hence, if a baron makes over the mill of a barony *cum multuris*, or *cum astrictis multuris*, *Thirlage to the mill of a barony.* (22)

A right of lands *cum multuris* implies their freedom from thirlage.

it infers an astriction of the barony lands to the mill conveyed, even of such as had been before sold to another for a certain duty *pro omni alio onere*; *L. Newliston v. Inglis*, July 17, 1620, M. 10,852 and 15,968. But if, prior to the baron's conveyance of his mill *cum multuris*, he had sold any part of the barony-lands to another *cum multuris*, the first purchaser's lands are not astricted by the posterior grant; for a right of lands with the multures implied a freedom of these lands from thirlage: and no person has power, after he is divested of lands, to subject them to any servitude from which they were before exempted; *Macpherson v. M'Intosh*, 1681, M. 15,985; *Buntin v. Boyd*, M. 15,986.

Thirlage of grindable corns.

(23)

15. Thirlage is either (1) of grindable corns; or (2) of all growing corns; or (3) of the *invecta et illata*, i.e., of all the grain brought within the thirle, though of another growth. Where the thirlage is of grindable grain, it is in practice restricted to the corns which the tenants have occasion to grind, either for the support of their families or for other uses; the surplus may be carried out of the thirle unmanufactured, without being liable in multure; *Lockhart v. Paterson*, Feb. 1731, M. 16,015; *Lockhart v. Durham*, Feb. 17, 1736, M. 16,016. Where it is of the *grana crescentia*, the whole grain growing upon the ground is astricted, with the exceptions (1) of seed and horse corn, which are destined to uses inconsistent with grinding; and (2) of the farm-duties due to the landlord, if they are deliverable in grain not grinded; for it is not to be presumed that the landlord, who must sell his farms, meant to extend the servitude against himself; but if the rent be payable in meal, flour, or malt, the grain of which these are made must be manufactured in the dominant mill.

Thirlage of *invecta et illata*;

(25)

16. The thirlage of *invecta et illata* is seldom constituted but against the inhabitants of a borough or village, that they shall grind all the corns they import thither at the dominant mill. Where this thirlage is imposed, the words generally are, all corns brought within the thirle that thole (or suffer)

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(p) But the term is flexible, and may be equivalent to *grana crescentia*; *Greig*, June 14, 1781, M. 16,068.

fire and water therein. Lord Stair (ii. 7, § 20), Craig (253, § 6), and Mackenzie (h. t. § 26), interpret these words of such tholing of fire and water as prepares the grain for the mill, that is, steeping the grain, and drying it in kilns; but not of brewing or baking, which is not done till after the grain is actually manufactured; which opinion is supported by practice (*Heriot's Hospital v. Alvis*, Feb. 22, 1707, M. 15,994): and upon this principle multure cannot be exacted in a thirlage of *invecta et illata* for flour or oat-meal brought into the servient tenement, unless the importer had bought it in grain, and grinded it at another mill; *Bakers of Perth v. Millers*, 1749, M. 16,025. The same grain that owes multure, as *granum crescens*, to the mill in whose thirle it grew, if it shall be afterwards brought within a borough where the *invecta et illata* are thirled, must pay a second multure to the proprietor of that dominant tenement; but where the right of these two thirlages is in the same proprietor, he cannot exact both; *Steedman v. Horn and Young*, 1722, M. 16,013. Where lands are thirled in general terms, without expressing the particular nature of the servitude, the lightest thirlage is presumed, from the favour of liberty, but in the astriction of a borough or village, where there is no growing grain which can be the subject of thirlage, the astriction of *invecta et illata* must be necessarily understood; *Mackie v. Malsters of Falkirk*, 1746, M. 16,023.

how interpreted.

Grain thus thirled may pay double multure.

(26)

(27)

17. Thirlage, in the general case, cannot be established by prescription alone, for *iis quæ sunt mercæ facultatis non præscribitur*; but where one has paid for forty years together the heavy insucken multures, the slightest title in writing will subject his lands, *e.g.*, a decree against him, in which he was not regularly called.(q) Thirlage may be, contrary to the common rule, constituted by prescription alone—(1) Where one pays to a mill a certain sum, or quantity of grain yearly, in name of multure, whether he grinds at it or not (which is called dry multure); for such

Thirlage by prescription;  
(28, 29, 30)

in the case of dry multure;

(q) *M'Alister v. D. of Argyll*, June 17, 1831, 9 S. 763; rev. July 12, 1832, 6 W. & S. 98.

payment cannot bear a construction consistent with the freedom of his lands. (2) In mills of the King's property; because the King's original right to all heritable subjects is constituted *jure coronæ*, without titles in writing; and where he derives right from another, his titles are more liable to be lost. This is extended in practice to mills belonging to church-lands in consequence of Act S., Dec. 16, 1612 (see Spots. Pr. 190), whereby thirty years' possession of church-lands by churchmen, computed backwards from the time of commencing the action against them, is deemed equivalent to a title in writing, from a presumption that their rights were destroyed at the Reformation (*Lord Maxwell v. Stot*, Jan. 22, 1740, M. 16,017). Though thirlage itself cannot be constituted by mere possession, the proportion of multure payable to the dominant tenement may be so fixed.

18. The possessors of the lands astricted are bound to uphold the mill, repair the dam-dykes and aqueducts, and bring home the mill-stones. These services, though not expressed in the constitution, are implied in thirlage; and even in thirlage not expressly constituted by writing, if the thirle has been in use to perform certain services, such partial use infers an obligation to perform all those that are usually demanded in that servitude; *Crawford v. Halkerston*, Dec. 16, 1732, M. 16,016. But where there is neither an explicit constitution of thirlage, nor proof of services of any sort performed by the suckeners, the dominant tenement can claim none (*L. Inches*, Dec. 1744, n. r.; *Brown v. Fletcher*, 1740, M. 16,018): for in such case the rule holds, *tantum præscriptum, quantum possessum*.

19. The proprietor of a mill can sue the tenants or possessors within the thirle, who have carried their grain to another mill, in an action of abstracted multures, which may be brought before the Judge-Ordinary. This action, if the proprietor of the lands be not cited, cannot have the effect to interrupt him from prescribing an immunity from the thirlage; but such prescription may be effectually interrupted by an action of declarator of thirlage against the

in mills of the  
King's pro-  
perty;

in mills of  
church-lands.

Mill-services,  
(19, 31)

implied in  
thirlage,

if services have  
been per-  
formed.

Actions com-  
petent upon  
thirlage.

(32)

proprietor, to which the Court of Session alone is competent.(r)

20. Servitudes being restraints upon property, are *stricti juris*: they are not therefore presumed, if the acts upon which they are claimed can be explained consistently with freedom;(s) and when servitudes are constituted, they ought to be used in the way least burdensome to the servient tenement. Hence, when one has a right of pasturage, or of feal and divot, upon a neighbouring muir or heath, though he has it, strictly speaking, upon the whole tenement according to the rule in servitudes, *unaquæque gleba servit*, yet the proprietor of the muir will be allowed to till part of it, if he leaves untilled what is enough for the purpose of the servitude; *E. Southesk v. Melgum*, Jan. 20, 1680, M. 14,531 and 7899; *Watson v. Feuars of Dunkennan*, 1667, M. 14,529. Hence, also, one who has a servitude of peats upon his neighbour's moss is not at liberty to extend it for the use of any manufacture which may require an extraordinary expense of fuel, but must confine it to the natural uses of the dominant tenement.(t)

21. Servitudes are extinguished—(1) *confusione*, when the same person comes to be proprietor of the dominant and servient tenements, for *res sua nemini servit*, and the use the proprietor thereafter makes of the servient tenement is not *jure servitutis*, but is an act of property.(u) Nor is the

Servitudes are *stricti juris*.

(33)

Extinction of servitudes;

(36, 37)

(r) See *Mags. of Glasgow v. Crawford*, Feb. 11, 1863, F.C.; *Harris v. Mags. of Dundee*, May 29, 1863, 1 Macph. 833. By 39 Geo. III. c. 55, "for encouraging the improvement of lands subject to the servitude of thirlage," in Scotland, provision was made, and has largely been taken advantage of, for the commutation of rights of thirlage.

(s) *Morris v. Mackean*, Feb. 19, 1830, 8 S. 564.

(t) *Supra*, § 11, note.

(u) The general rule is, that "a servitude thus extinguished revives not though the right of the two tenements be again divided" (Inst. l. c.), but that circumstances may show an intention to maintain the servitude, or an implied grant of it, when the tenements are again separated, as e.g., if the same proprietor holds the dominant and servient tenements by separate titles; *Bell's Pr.* 997; *Donaldson's Trs. v. Forbes*, Feb. 1, 1839, 1 D. 449. And it has been said that "when two properties are possessed by the same owner, and a severance has been made of one part from the

*confusione* ; astriction of tenants to the landlord's mill an exception from this rule ; for in thirlage it is not the lands themselves that are astricted, but the fruits which belong to the tenant. (2)

*interitu rei* ; By the perishing either of the dominant or servient tenement : but if a mill shall be only disabled for a time from service, the thirle can, during such temporary insufficiency, carry no more of their grain to other mills than what they have immediate use for ; *E. Wigton v. Kirkintilloch*, Jan. 1736, Elch. "Multures," 3.(v) By the former practice, they were in such case subjected to the multures, as if the mill could have served them ; and were only exempted from the sequels ; *Macdougall v. McCulloch*, Feb. 28, 1684, M. 8897.

*non utendo*. (3.) Servitudes are lost *non utendo*, by the dominant tenement's neglecting to use the right for forty years ; which is considered as a dereliction of it, though he who has the servient tenement should have made no interruption by doing acts contrary to the servitude.(x)

Extinction of  
thirlage,  
(38)  
by a clause  
*cum multuris*,  
  
even in the  
*tenendas*,  
  
22. Thirlage may be extinguished by a charter of the astricted lands granted by the owner of the dominant tenement *cum multuris* ; which does not barely presume that the lands in the grant were before free, but implies an exemption, though they had been formerly burdened with thirlage (*Graeme v. Ure*, Jan. 26, 1705, M. 15,992) : nor is it necessary that such clause be inserted in the dispositive part of the charter, because exemption from servitude is only a quality annexed to lands, and not a separate subject (*Veitch v. Duncan*, 1695, M. 15,975 ; *Harrowsers v. Horn*, 1750, M. 16,026) ; but where the vassal has continued to pay insucken

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other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted, must be considered to follow from the grant." By necessary is meant "necessary for its convenient and comfortable enjoyment as it existed at the time of the grant ;" *per* Lord Campbell, C., in *Cochrane v. Ewart*, March 25, 1861, 4 Macq. 117 (in the C. of S. Jan 13, 1860, 22 D. 358).

(v) *Clark's Tr. v. Hill*, Feb. 29, 1828, 6 S. 659.

(x) In negative servitudes the negative prescription begins to run from the time when the owner of the servient tenement does the first act repugnant to the servitude right ; Inst. l. c. They may also be extinguished by abandonment in the titles ; *Sivcrright v. Wilson*, Dec. 19, 1828, 7 S. 210. All servitudes cease by renunciation ; Inst. l. c.

multures after such charter, freedom from thirlage is not inferred; *Stair*, ii. 7, § 24.(y) In rights flowing from the Crown, the clause of multures, when it is only in the *tenendas*, has no effect; because when signatures are presented in Exchequer the greatest part of the *tenendas* is left blank, which is afterwards filled up at the discretion of the chancery-clerk, or the framer of the signature; *Stewart v. Aberbadnoch Feuars*, Jan. 8, 1662, M. 10,854. except in rights flowing from the Crown.

23. Personal servitudes are those by which the property of a subject is burdened in favour, not of a tenement, but of a person. The only personal servitude known in our law is *usufruct* or *liferent*,<sup>(z)</sup> which is a right to use and enjoy a thing during life, the substance of it being preserved. A *liferent* cannot therefore be constituted upon things which perish in the use; and though it may upon subjects which gradually wear out by time, as household furniture, &c., yet with us it is generally applied to heritable subjects.<sup>(a)</sup> He whose property is burdened is usually called the *fiar*. Personal servitudes. (39, 40)

24. *Liferents* are divided into conventional and legal. Conventional *liferents* are either simple or by reservation. A simple *liferent*, or by a separate constitution, is that which is granted by the proprietor in favour of another: and this sort, contrary to the nature of predial servitudes, requires *seisin* in order to affect singular successors; for a *liferent* of lands is, in strict speech, not a servitude but a right resembling property, which constitutes the *liferenter* vassal for life; and singular successors have no way of discovering a *liferent* right, which perhaps is not yet commenced, but by Conventional liferent; (41)

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(y) Though supported by one decision, this is to be received with some qualification; *Bell's Prin.* 1031.

(z) *Liferent* may rather be considered as a qualified right of property—qualified both in point of time and of the proprietor's right of dealing with the subject.

(a) Or to money, the interest of which is enjoyed by the *liferenter*. But though the *liferenter* has a right to the interest of such subjects as bank stock, he has no right to the fee or bonuses or accumulations, not being of the nature of dividends annually recurring; *Rollo v. Houston's Trs.*, 1801, M. 8282, rev. 4 Pat. 521; see *Cumming v. Cumming's Trs.*, Feb. 26, 1824, 2 S. 743; and below, § 33, note.

Proper right of  
liferent in-  
transmissible.

the records; whereas in predial servitudes the constant use of the dominant tenement makes them public. The proper right of liferent is intransmissible, *ossibus usufructuarii inhæret*. When the profits of the liferented subject are transmitted to another, the right becomes merely personal, for it entitles the assignees to the rent, not during his own life, but his cedent's, and is therefore carried by simple assignation without seisin.

Liferent by  
reservation,

(42)

entitles to the  
entering of  
vassals and to  
casualties.

25. A liferent by reservation is that which a proprietor reserves to himself in the same writing by which he conveys the fee to another. It requires no seisin; for the grantor's former seisin, which virtually included the liferent, still subsists as to the liferent which is expressly reserved. A liferenter by reservation may enter the heirs or singular successors of vassals, as if he were fiar (Craig, 416, § 5), and is entitled to the casualties of superiority that fall during his life; his right being more amply interpreted than that of a simple liferenter who had no prior interest in the lands. (b) In conjunct infeftments taken to husband and wife, the wife's right of conjunct fee resolves, in the general case, into a liferent, which is, however, as extensive as a liferent by reservation.

Liferents by  
law.

(44)

Terce,

26. Liferents by law are the terce and the courtesy. The terce (*tertia*) is a liferent competent by law to widows who have not accepted of special provisions, in the third of the heritable subjects in which their husbands died infeft. (c) By our ancient customs the widow was entitled only to a third of the lands in which the husband stood infeft at the marriage, so that she had no claim upon what he had acquired during the marriage, perhaps by her own industry

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(b) But he cannot grant a feu effectual beyond his own life; *Redfern v. Maxwell*, March 7, 1816, F.C. A liferenter by constitution may be invested by the grantor with power to enter vassals as a quality of his right; *Gibson-Craig v. Cochrane*, July 10, 1838, 16 S. 1332, aff. Sept. 23, 1841, 2 Rob. 446. As to the abolition of entries and casualties, see *supra*, note at end of t. 5, and Conveyancing Act, 1874, §§ 4, 15, *et seq.*

(c) It is also competent to wives who have obtained decree of divorce against their husbands; *Ralston v. Leitch*, 1803, Hume 293; see above, i. 6, 25.

or economy; R. M., l. 2, c. 16, § 5, 9. The terce takes place when due; only where the marriage has subsisted for year and day, or where a child has been born alive of it.(d) No terce <sup>husband must be infeft;</sup> is due out of lands in which the husband was not infeft (*Carruthers v. Johnston*, Jan. 29, 1706, M. 15,840); unless in the case of fraudulent omission; for which see Craig, 423, § 27; Stair, ii. 6, § 16.(e)

27. The terce is not limited to lands, but extended to teinds,(g) and to servitudes and other burdens affecting <sup>out of what subject is it due;</sup> lands; thus the widow is entitled, in the right of her terce, to a liferent of the third of the sums secured, either by rights of annualrent or by rights in security. In improper wadsets the terce is the third of the sum lent. In those that are proper it is a third of the wadset lands; or, in case of redemption, a third of the redemption-money. If the husband had two dwelling-houses, the widow has right to the second;(h) if he had but one, the heir must, in the opinion of Craig, allow her the third of it (424, § 29). By the later practice he is entitled to the sole possession of it, but cannot let it to another (*Logan v. Galbraith*, Jan. 26, 1665, M. (48, 49, 46))

(d) This condition is now abolished, and terce is due even where the marriage has been dissolved within year and day, and no child has been born; 18 Vict. c. 23, § 7.

(e) But the infeftment of a trustee for behoof of the husband, he being the real proprietor, is equivalent to the infeftment of the husband himself; as is also the infeftment of a creditor on an absolute disposition, qualified by an unrecorded back-bond; *Belshier v. Moffat*, 1779, M. 15,863; *Bartlett v. Buchanan*, Feb. 11, 1811, F.C. It follows from the rule in the text that where the heir has sold the estate the terce is a preferable burden on the lands, even although the purchaser completes his title before the widow's service to her terce; *Boyd v. Hamilton*, 1805, M. 15,874. Nor is it barred by a reduction of the husband's infeftment after his death, proceeding on nullities which he could have obviated during his life, had he been required to do so; *Rose v. Fraser*, 1790, M. App. "Terce," 1. If the husband's right, though *ex facie* absolute, be really a trust, or a merely nominal fee, the wife has no terce; Bell's Com. i. 59.

(g) If vested by separate infeftments; *Moncrieff v. Tenants of Newton*, 1779, M. 15,733, 15,844; *Arbuthnott v. Arbuthnott*, 1805, Hume 294.

(h) Or more probably to a third of the annual value of it; Bell's Com. i. 58 (ed. Shaw 806); Prin. 1598, 1603.

15,842). Neither rights of reversion,<sup>(i)</sup> superiority,<sup>(k)</sup> nor patronage,<sup>(l)</sup> fall under the terce; for none of these have fixed profits, and so are not proper subjects for the widow's subsistence; nor tacks, because they are not feudal rights. Burgage tenements are also excluded from it (Craig, 425, § 34), the reason of which is not so obvious.<sup>(n)</sup> Since the husband's seisin is both the measure and security of the terce, such debts or diligences alone as exclude the husband's seisin can prevail over it. A disposition of lands,<sup>(o)</sup> therefore, or an heritable bond granted by the husband, or an adjudication led against his estate, if not followed by seisin, cannot affect the terce.

Lesser terce.

(47, 48)

Terce now excluded by a special provision.

28. Where a terce is due out of lands burdened with a prior terce, still subsisting, the second tercer has only a right to a third of the two-thirds that remain unaffected by the first terce (R. M., l. 2, c. 16, § 64). But upon the death of the first widow, whereby the lands are disburdened of her terce, the lesser terce becomes enlarged, as if the first had never existed. Formerly the widow was, contrary to the common rules, entitled to a terce even though the husband had made a special provision in her favour, unless it had been expressly granted in satisfaction of the terce; but by 1681, c. 10, the widow who has accepted of a special provision from her husband is thereby excluded from the terce, unless such provision shall contain a clause that she shall have right to both.<sup>(p)</sup>

Brief of terce.

(50)

29. The widow has no title of possession, and so cannot receive the rents in virtue of her terce, till she be served to it; and in order to do this, she must obtain a brief out of the

(i) *Macdougall v. Macdougall*, 1801, M. App. "Terce," 3.

(k) *Nisbet v. Nisbet's Trs.*, Feb. 24, 1835, 13 S. 517.

(l) *D. of Roxburghe v. Duchess of Roxburghe*, June 25, 1818, F.C.

(n) This exception is removed by 24 & 25 Vict. c. 86, § 11.

(o) "The remedy of the purchaser is to retain a portion of the price corresponding to the value of the subjects burdened by the terce; *Maculloch v. Mailand*, July 10, 1788, M. 15,866; *Boyd v. Hamilton*, 1805, M. 15,874."—MOIR.

(p) To exclude the terce the widow must accept or acquiesce in a conventional provision in the full knowledge of her legal rights; Bell's Com. i. 58.

Chancery, directed to the Sheriff, who calls an inquest to take proof that she was wife to the deceased, and that the deceased died infert in the subjects contained in the brief. The service or sentence of the jury finding these points proved, does, without the necessity of a retour to the Chancery, entitle the wife to enter into the possession (Stair, ii. 6, § 13), but she can only possess with the heir *pro indiviso*, and so cannot remove tenants till the sheriff kens to her terce, or divides the land between her and the heir. In this division, after determining by lot or kaval whether to begin by the sun or the shade (*i.e.*, by the east or the west), the sheriff sets off the two first acres for the heir, and the third for the widow. Sometimes the division is executed by giving one entire farm to the widow, and two of equal value to the heir. The widow's right is not properly constituted by this service; it was constituted before by the husband's seisin, and fixed by his death: the service only declares it, and so entitles her to the third part of the rents *retro* to her husband's death, preferably to any rights that may have affected the lands in the intermediate period between that and her own service.<sup>(g)</sup> The relict, if she was reputed to be lawful wife to the deceased, must be served, notwithstanding any objections by the heir against the marriage, which may be afterwards tried by the Commissary; 1503, c. 77.

Service of widows.

Kenning of widows, or the division of the lands.

The right of terce is constituted before service.

30. Courtesy is a liferent given by law to the surviving husband of all his wife's heritage in which she died infert, if there was a child of the marriage born alive.<sup>(r)</sup> A marriage, though of the longest continuance, gives no right to the courtesy if there was no issue of it. The child born of the marriage must be the mother's heir; if she had a child of a former marriage, who is to succeed to her estate, the husband has no right to the courtesy while such child is

Courtesy, (52)

when due;

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(g) But it has been held that if the widow die without having been served, her right to the unpaid rents does not pass to her representatives; *McLeish v. Rennie*, Feb. 21, 1826, 4 S. 485. This case has been doubted; Bell's Prin. 1602; More's Notes on Stair, 218; but it would probably be held to rule the point.

(r) This condition is not affected by the Moveable Succession Act, 18 Vict. c. 23, § 7.

- alive (*Darling v. Campbell*, Dec. 1, 1702, M. 3113), contrary to Sir Thomas Craig's opinion (428, § 43), so that the courtesy is due to the husband rather as father to an heir than husband to an heiress; conformably to the Roman law, which gives to the father the usufruct of what the child succeeds to by the mother; l. 1, *C. de bon. mat.* (6, 60). Heritage is here opposed to conquest (iii. 8, § 6), and so is to be understood only of the heritable rights to which the wife succeeded as heir to her ancestors, excluding what she herself had acquired by singular titles.<sup>(s)</sup>
- how burdened; 31. Because the husband enjoys the liferent of the wife's whole heritage on a lucrative title, he is considered as her temporary representative, and so is liable in payment of all the yearly burdens chargeable on the subject, and of the current interest of all her debts, real and personal, to the value of the yearly rent he enjoys by the courtesy; *Monteith v. Monteith*, 1717, M. 3117. The courtesy needs no solemnity to its constitution. That right which the husband had to the rents of his wife's estate during the marriage *jure mariti* is continued with him after her death, under the name of courtesy, by an act of the law itself. As in the terce the husband's seisin is the ground and measure of the wife's right, so, in the courtesy, the wife's seisin is the foundation of the husband's,<sup>(t)</sup> and the two rights are in all other respects of the same nature; if it is not, that the courtesy extends to burgage-holdings (L. B., c. 44), and to superiorities (arg. 1681, c. 21).
- it is only of heritage;  
it is constituted without any service.  
Wife must be infeft.  
Right of liferent, how limited;  
as to growing timber;
32. All liferenters must use their right *salva rei substantia*. Whatever, therefore, is part of the fee itself cannot be encroached on by the liferenter, *e.g.*, woods or growing timber, even for the necessary uses of the liferented tenement (*Lady Borthwick v. Borthwick's Crs.*, July 3, 1696, M. 8245). But where a coppice or *silva cædua* had been divided into hags, one of which was in use to be cut annually by the proprietor, the liferenter may continue the former

(s) *Lawson v. Gilmour*, 1609, M. 3114; *Hodge v. Fraser*, 1740, M. 3119.

(t) See *L. Clinton v. Trefusis*, Dec. 18, 1869, 8 Macph. 370.

yearly cuttings; because these are considered as the annual fruits the subject was intended to yield, and so the proper subject of a liferent.(u) Liferenters have no right to coals <sup>as to minerals.</sup> or minerals underground if they be not expressed in the right; for they are proper *partes soli*; *Lady Preston v. L. Preston*, July 13, 1677, M. 8242; *Heirs of Roseburn*, June, 1727, n. r. Where they are expressed, the liferenter may, by the former rule, work any colliery that had been opened before the commencement of his right, provided he does not employ a greater number of colliers, or bring up a greater quantity of coals, than the proprietor did.(x)

33. Our law, to preserve the liferented subjects for the <sup>Burdens affecting it. (59-63)</sup> *fiar*, directed liferenters to give security (called in the Roman law *cautio usufructuaria*), that they should keep them in <sup>cautio usufructuaria.</sup> good condition during the liferent (1491 c. 25), under the penalty of losing the profits thereof (1535, c. 15).(y) A special method is chalked out in the case of tenements within borough, by Act 1594, c. 226. Liferenters(z) are also burdened with the alimony of the heir, where he has not <sup>Alimony of the heir.</sup> enough for maintaining himself, which is founded in an extension of the last clause of Act 1491, c. 25; by the first part whereof, not only ward-superiors, but liferenters, were

(\*) The liferenter is also entitled to all windfalls, and he may use mature timber, whether blown down or not, for the necessary purposes of the estate, upon giving notice to the *fiar*; *Dickson v. Dickson*, Jan. 24, 1823, 2 S. 138; *M<sup>r</sup> Alister's Trs. v. M<sup>r</sup> Alister*, June 27, 1851, 13 S. 1239. Correct accordingly the doctrine of *L. Borthwick* in the text.

(z) The existence and extent of the right to mines and quarries often depend on the terms in which the right of liferent is constituted; see cases in Bell's Pr. 1042.

(y) In practice it seems necessary to show cause for expecting injury to the tenement before this caution can be exacted; *Ralston v. Leitch*, 1803, Hume 293. Where a farm is liferented with its accessory moveables (a stocked farm), the liferenter is bound to keep up the stock, and leave it at the end of the liferent substantially of the same description, value, and extent as at the commencement; and a claim will arise on the one side or the other in respect of a material difference; *Roger's Trs. v. Scott*, July 19, 1867, 5 Maph. 1078.

(s) But not annuitants on an estate, *Stewart v. Campbell*, 1780, M. 380, 5 B.S. 377, Hailes 861; nor liferenters of money, *Mirrie v. Pollocks*, 1731, M. 397.

obliged to preserve in good condition the subject of the ward or liferent. The name of an employment, if it does not afford bread to the heir, will not defend the liferenter against this burden; *Ayton v. Colvill*, July 25, 1705, M. 390. The bare right of apparenecy founds the action against the liferenter; *Hepburn v. Seton*, Feb. 12, 1635, M. 381. It is a burden personal to the liferenter himself, and cannot be thrown upon his adjudging creditors, as coming in his place by their diligences; *Cred. of Blair*, 1737, n. r. Liferenters are also subjected to the payment of the yearly cesses, stipends, &c., falling due during their right, and to all other burdens that attend the subject liferented.(a)

(61)

The expiry of  
liferents,

(64)

of lands,  
regulated by  
the legal  
terms.

34. Liferent is extinguished by the liferenter's death. That part of the rents which the liferenter had a proper right to before his death falls to his executors; the rest, as never having been *in bonis* of the deceased, goes to the fiar.(b) Martinmas and Whitsunday are, by our custom, the legal terms of the payment of rent; consequently, if a liferenter of land survives the term of Whitsunday, his executors are entitled to the half of that year's rent, because it was due the term before his death; if he survives Martinmas, they have a right to the whole. And this is the rule, though the conventional term should be after Martinmas; for still the rent, though not payable, was due while the liferenter was yet alive; and the postponing the term of payment cannot hurt the right of the executors; *Carnegy v. Carnegy*, July 24, 1668, M. 15,887.(c) A liferenter who outlives part of the term-day, transmits to his executors

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(a) Such as interest on heritable bonds affecting the subjects liferented: *Lady Forbes*, Jan. 29, 1765, 2 Pat. 84; but not to burdens which are only occasional, and which the law lays on heritors, such as building or repairing churches and manses; *Anstruther v. Anstruther*, May 14, 1823, 2 S. 306.

(b) As to the division of rents between the heirs and executors of a fiar in full possession of the subjects, see note (e).

(c) But if by convention rents be made payable before the legal term, the executor has the benefit of that convention, for there is no instance of what is both due and exigible not descending to executors; *Queensberry v. Queensberry's Exrs.*, Feb. 18, 1814, F.C.; compare note (e) at end.

the right to that term; *Paterson v. Smith*, Dec. 8, 1794, M. 15,902. If the liferenter, being in the natural possession, and having first sowed the ground, should die even before the Whitsunday, his executors are entitled to the whole crop, in respect that both seed and industry were his; *Guthrie v. L. Mackerston*, July 25, 1671, M. 15,891. Liferents of mills, though their fruits are continual, *de die in diem*, are governed by the same rule with liferents of lands; *Guthrie v. L. Mackerston*, Dec. 8, 1617, M. 15,890.(d) In a liferent of money constituted by a moveable bond the executors have a right to the interest, down to the very day of the liferenter's death, where no terms are mentioned for the payment thereof; but in the case of an heritable bond, or of a money-liferent secured on land, the interests of liferenter and fiar (or of heir and executor, for the same rules serve to fix the interests of both), are governed by the legal terms of land-rent, *Carruthers v. Barclay*, Jan. 11, 1738, M. 5413; without regard to the conventional, *Trotter v. Rothead*, Jan. 12, 1681, M. 15,899, 2375.(e)

What if the liferenter sowed the ground.

Liferents of mills;

of money.

(d) "In urban tenements the rent, though not payable conventionally till half the expiry of the year or later, is yet held as between heir and executor to be due at the moment of entry; *Binny v. Binny*, Jan. 28, 1820, F.C.; *King v. Jeffrey*, Jan. 28, 1828, 6 S. 422. Consequently, in a competition between an heir and executor, where the ancestor had died in August, while the possession had commenced at Whitsunday, the rent from Whitsunday to Martinmas was held due, and *in bonis* of the executors of the ancestor. 'The point,' says Mr. Hunter, vol. ii. p. 316 (4th ed. 335), 'was considered as settled by the repeated decisions where the competition was between the heir and executor for the rents of grass farms, for that is held to commence before any actual benefit is drawn by the tenant.'—MOIR.

(e) "This appears to have been conceded in *Dalhousie v. Gilmour*, 1789, M. 15,916. If annuities are made payable only termly, like the interest on heritable bonds, the right to the payment vests only at the specified term, so that if an annuitant dies between terms, no claim can be made by his executor for a proportion of the annuity corresponding to that portion of the term during which he survived. But if it is stipulated that it shall be paid daily and continually, the right vests *de die in diem*. Some alterations have been made in our law by the Apportionment Act, 4 & 5 Will. IV. c. 22. It was held in *Fordyce v. Brydges*, Feb. 23, 1847, 6 Ball's App. 1, that this statute applies to Scotland,

Apportionment Act.

## TIT. X.—OF TEINDS.

Benefices  
consist of

(4, 5, 7)

church-lands.

1. Ecclesiastical rights are called *benefices*, an appellation transferred from secular feus to church-livings, because they were given to churchmen in consideration of their spiritual warfare. They consist either of lands, or of the tithe or teind of lands; the first is called the *temporality*, the other the *spirituality* of the benefice. That church-lands might not be aliened by the beneficiaries in prejudice of their

though its phraseology is so completely English that it is with difficulty made applicable to our law. The substance of the second section is, that all rents, annuities, pensions, dividends, or other payments made payable or becoming due at fixed periods under any instrument executed after the passing of the Act (*i.e.*, June 16, 1834) shall be apportioned in such a manner that, on the death of the party interested, or on the determination by whatever other means of the interest of such person, his executors shall be entitled to a proportion of such rents, annuities, pensions, and other payments 'according to the time which shall have elapsed from the commencement or last period of payment respectively, as the case may be, including the day of the death of such person, or the determination of such interest.' Nothing can apparently be broader than the terms of this clause." Strangely enough, however, in accordance with English decisions, it was held both here and in the House of Lords not to apply to fee-simple estate. "The result of the cases appears to be:—that the statute in some cases *extends*, but never *abridges the right of the executor*. It leaves his common law right to all rents which have vested where it was, but it gives him, in addition, a right to a proportion of that term's rents which have not yet vested, corresponding to the time when the former proprietor survived; see *Hard v. Anstruther* Nov. 14, 1862, 1 Macph. 14; *Paul v. Anstruther*, Feb. 15, 1864, 2 Macph. H.L. 1."—MOIR. The Apportionment Act, 1870, 33 & 34 Vict. c. 35, §§ 1, 7, extends to fee-simple estates. By it all "periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." But the operation of the Act may be excluded by express stipulation. The statute applies to fore-hand rents, as being "periodical payments accruing from day to day" (*L. Herries v. Maxwell's Curator*, Feb. 6, 1873, 11 Macph. 396; compare *Maxwell v. Scott*, Nov. 5, 1873, 1 R. 122); but not to payment of stipends and ann (*Latta v. Edinburgh Ecclesiastical Commrs.*, Nov. 30, 1877, 5 R. 266).

successors, bishops, and the heads of religious houses, were disabled from making grants without the consent of the chapter or convent; which rule continued after the Reformation, during church-government by bishops; 1606, c. 3. The King's confirmation, as the presumed patron, was also to be adhibited to grants of church-lands (R. M., l. 2, c. 23), which right, though wrested from our Sovereigns by the Pope (Craig 146, § 29), was, upon the Reformation, restored to the Crown, 1584, c. 7, &c.

2. Teinds, or tithes, are that liquid proportion of our rents or goods which is due to churchmen for performing divine service, or exercising the other spiritual functions proper to their several offices. Most of the canonists affirm that the precise proportion of a tenth, not only of the fruits of the ground, but of what is acquired by personal industry, is due to the Christian clergy of divine right, which they therefore call the proper patrimony of the church; though it is certain that tithes in their infancy were given, not to the clergy alone, but to lay-monks, who were called *pauperes*, and to other indigent persons. Charles the Great was the first secular Prince who acknowledged this right in the church. It appears to have been received with us as far back as David I., by two charters of that King, preserved in Anderson's Diplomata. Our first statute concerning teinds is David II. c. 42.

3. This right, if it had been divine, ought naturally to have belonged to the pastor of the parochial church; but its application was for a long time miserably inverted; for not only did those who were liable in payment at first consider their obligation as fulfilled by giving the right of their tithes to any poor lay friend, but even after tithes had been by the church canons consecrated to the parochial churches, the patron, who in those ages looked on himself upon the emerging of every vacancy as the absolute proprietor of the benefice, assumed frequently a power of appropriating or annexing it to a cathedral church or monastery; by which annexation the cathedral or monastery became the beneficiary or titular of the benefice annexed. At other times, churchmen who had not their tithes regularly paid them

Teinds which ought to have been paid to the parson,

(11, 12, 14, 15)

were frequently appropriated to cathedrals and monasteries.

Certain orders  
exempted from  
paying them.

These abuses  
corrected by  
canons.

Vicar ;

(12)

at first named  
during plea-  
sure ; after-  
wards per-  
petual.

Mensal and  
common  
churches.

(11)

(10-13)

made a grant of part of them to the Sovereign, that they might the better engage his interest for making the rest effectual. And lastly, most of the religious orders procured from the Pope an exemption from payment of the tithe of lands possessed by themselves, which ought to have been paid to the several churches where the lands lay. These abuses were in some measure corrected, first, by a papal constitution of Adrian IV., *anno* 1156, limiting such exemptions to the three orders—of Cistercians, Hospitallers, and Templars ; (a) and afterwards by several Councils of Lateran (one held by Alexander III. in 1180, one by Innocent III. in 1215, &c.), prohibiting the further infeudation of tithes to laymen, and their further consecration to any other than the parish church.

4. The person employed by the cathedral church or monastery to serve the cure in the church annexed was called a *vicar*, because he held the church, not in his own right, but in the right or vice of his employers ; and so was removeable at pleasure, and had no share of the benefice other than what they thought fit to allow him. But, in the course of time, the appellation of vicar was limited to those who were made perpetual, and who got a stated share of the benefice for their incumbency ; from whence arose the distinction of benefices into *parsonages* and *vicarages*. The bishops (according to Forbes on "Tithes," pp. 35, 36), about the thirteenth century divided with their chapters the churches that had been annexed to their cathedrals : those which fell to the bishop himself were styled *mensal*, because they supported the expense of his table ; those that went to the chapter were called *common*, as belonging in common to all its members ; but it is more probable that this distinction owed its rise, long before the thirteenth century, to the appropriation of parochial churches to cathedrals ; some of which the patron gave to the bishop himself, which were called mensal ; and others to the bishop and his chapter, which got the name of common.

5. Personal teinds, *i.e.*, the tenth of what one acquires by

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(a) See below, § 19, note (n).

his own industry or employment, are not acknowledged by our law, though they have been found due when supported by forty years' possession; *Berny v. Nithsdale*, Nov. 29, 1678, M. 2489. Predial teinds are, by the usage of Scotland, either parsonage or vicarage. Parsonage-teinds are the teinds of corn; and they are so called because they are due to the parson, or other titular of the benefice. (b) Vicarage-teinds are the small teinds of calves, lint, hemp, eggs, &c., which were commonly given by the titular to the vicar who served the cure in his place. The first sort was universally due, unless in the case of their infeudation to laics, or of a pontifical exemption; but by the customs of almost all Christendom the lesser teinds were not demanded where they had not been in use to be paid. By the practice of Scotland the teinds of animals, or of things produced from animals, as lambs, wool, calves, are due, though not accustomed to be paid; *L. Grant v. M'Intosh*, July 24, 1678, M. 10,763; but roots, herbs, &c., are not titheable, unless use of payment be proved; *Burnet v. Gibb*, June 9, 1676, M. 15,640. (c)

Teinds are either parsonage or vicarage.

Parsonage-teinds are universally due, but vicarage are local.

6. The parson who was entitled to the teind of corns, made his right effectual either by accepting of a certain number of teind-bolls yearly from the proprietor in satisfaction of it; or more frequently by drawing or separating upon the field his own tenth part of the corns, after they were reaped, from the stock or the remaining nine-tenths of

Parsonage-teind was most commonly drawn from the stock.

(24)

(b) "In regard to parsonage-teinds, it was at one time held that lands laid out in grass, or let as grass fields, were not to be considered as teindable subjects. But when the system of valuation of teinds became general, this notion, which had no equitable foundation, came to be shaken, and may now be considered as finally overturned; *Learmonth v. City of Edinr.*, June 1, 1858, 21 D. 892. Lands in pasture are now, equally with arable lands, subject to teinds, parsonage and vicarage; and both are liable to be localled on for stipend (without a decree of valuation) at one-fifth of the ascertained value."—MOIR.

(c) See *Stair*, ii. 8, 6. Custom is the criterion in all questions of vicarage-teinds, and the distinction here stated does not now hold good; *Hunter v. D. of Roxburgh*, 1796, M. 15,728, Bell's Pr. 1155. As to fish teind, see *Johnstone v. Chalmers*, 1780, 2 Pat. App. 559; *Scott v. Methuen*, May 23, 1861, 13 D. 991. As to its commutation, see 27 & 28 Vict. c. 33.

Hardship  
attending  
drawn teind.

Removed in  
part by  
statute.

Church-lands  
fell to the  
Crown upon  
the Reforma-  
tion.

(17, 18)

Erection of  
benefices into  
temporal lord-  
ships.

Annexation of  
church-lands  
to the Crown.

(19, 22)

(20, 23)

the crop, and carrying it off to his own granaries, which is called drawn teind. And if any possessor of lands carried his part of the corns off the ground before the churchman had drawn the teind, he was liable in a spuilzie; which frequently occasioned the loss of the whole crop, in the case either of an ill-natured or of an indolent titular. This hardship was softened rather than removed by the Acts 1606, c. 8; 1612, c. 3; 1617, c. 5, regulating the times within which the titular must either draw his teind or leave the possessor of the lands at liberty to carry off his stock.

7. After the Reformation James VI. considered himself as proprietor of all the church-lands; partly because the purposes for which they had been granted were declared superstitious; and partly in consequence of the resignations which he and Queen Mary, his mother, had procured from the beneficiaries. And even as to the teinds, though our reformed clergy, after the example of the canonists, claimed them as the patrimony of the church, our Sovereign did not submit to that doctrine, further than it extended to a competent provision for ministers. He therefore erected or secularised several abbacies and priories into temporal lordships, the grantees of which were called sometimes lords of erection, and sometimes titulars, as having by their grants the same title to the erected benefices that the monasteries had formerly.

8. As the Crown's revenue suffered greatly by these erections, the temporality of all church-benefices (i.e., church-lands) was, by 1587, c. 29, annexed to the Crown. That statute, though it does not comprehend teinds,<sup>(d)</sup> excepts from the annexation the teinds of lands belonging to parsonages and vicarages, together with their manse and glebes; and declares that all these shall remain with the present possessors, or with those that shall be afterwards provided to the benefices. Lands granted to universities, schools, and hospitals are also excepted (though these did not truly fall within the Act, not being church-lands); and

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(d) The author, Inst. § 22, doubts whether teinds are not annexed; but the statement in the text seems to be correct. See Inst., Ivory's note.

benefices of laic patronages, by which is meant such as were established before the Reformation in laymen, whose rights the Legislature had no intention to weaken. Notwithstanding this statute, his Majesty continued to make farther erections, which were declared null by 1592, c. 121, with an exception of such as had been made in favour of Lords of Parliament since the general Act of Annexation in 1587.

9. King Charles I., soon after his succession, raised a reduction of all these erections, whether granted before or after the Act of Annexation, upon the grounds mentioned at length by Mr. Forbes in his Treatise on Tithes, p. 259. In a conference between the King and the titulars upon the subject of this suit his Majesty insisted—(1) That all proprietors should be relieved from the hardship of having their teinds drawn by the titulars. (2) That all the superiorities of erections (*i.e.*, of lands holden of the titulars, as coming in place of the monasteries) should be declared to be in the Crown, on a reasonable composition to be paid to the titulars for passing from their right. (3) That a small interest should be reserved to the Crown out of all the erected teinds. At last the whole matter was referred to the King himself by four several submissions or compromises, in which the parties on one side were the titulars and their tacksmen, the bishops with the inferior clergy, and the royal boroughs, for the interest they had in the teinds that were gifted for the provision of ministers, schools, or hospitals within their boroughs; and, on the other part, the proprietors who wanted to have the leading of their own teinds. The submission by the titulars contained a surrender into his Majesty's hands of the superiorities of the several erections.

King Chas. I.  
raises reduction of the erections.

(26, 28)

His Majesty's demands.

All differences referred to the King himself.

10. Upon each of these submissions his Majesty pronounced separate decrees-arbitral, dated Sept. 2, 1629, which are subjoined to the Acts of Parliament of his reign. He made it lawful to proprietors to sue the titulars for a valuation, and, if they thought fit, for a sale also of their teinds, before the commissioners named, or to be named, for that purpose. The rate of teind, when it was possessed by the proprietor jointly with the stock, for payment of a certain duty to the titular, and so did not admit a separate valua-

His decrees-arbitral.

(28, 29)

Proprietor may sue for a valuation and sale of tithes.

Teinds valued either jointly,

tion, was fixed at a fifth part of the constant yearly rent, which was accounted a reasonable *surrogatum*, in place of a tenth of the increase; *Hay v. D. Roxburghe*, M. 15,750.(e) or separately. Where it was drawn by the titular, and consequently might be valued separately from the stock, it was to be valued as its extent should be ascertained, upon a proof before the commissioners; but in this last valuation the King directed the fifth part to be deducted from the proved teind in favour of the proprietor, which was therefore called the King's ease (*Doul*, Jan. 28, 1708; *Home*, Feb. 7, 1711, n. r.). The proprietor suing for a valuation gets the leading of his own teinds as soon as his suit commences; but if he shall suffer protestation to be extracted against him for not insisting in the process, he loses that privilege by 1693, c. 23. The proprietor is in all valuations allowed a joint proof with the titular by our present law, 1690, c. 30; and upon getting his decree of valuation he may be compelled by the titular, if he shall insist for it, to infest him in the lands for his security of the valued teind; Mackenzie, h. t. § 16.(g).

Privilege of a proprietor suing for a valuation.

(35, 38)

(e) Even in the case of lands which had never been tilled at the time of valuation, and which therefore yielded no parsonage-teind, a valuation of the stock and vicarage-teind, *conjunctive* at one-fifth, of the rent, is a valid commutation of the whole teind; *Houston v. Com. Agent of Haddington*, Jan. 17, 1868, 6 Macph. 235.

(g) "If teinds come now to be valued for the first time, it is by a process of valuation before the Supreme Court. As a great many valuations took place before the Commissioners, particularly in the years 1628 and 1629, the Court of Teinds forms also a court of review of the proceedings before the Sub-Commissioners appointed for carrying out the valuations. These valuations by the Sub-Commissioners formed the rule of settlement between the parties only so long as they were acquiesced in by them; but in themselves they had no legal force or authority until approved of by the High Commission, and now by the Court of Teinds as coming in its place. Assuming no such objection as dereliction to be stated when a decree of approbation was applied for, it was competent for the High Commission, and is now competent for the Court, to review the whole proceedings, and to judge whether the decree of the Sub-Commission had been rightly obtained; whether, for instance, all parties who were interested in the valuation had been duly called. It is sufficient if the heritors, patron, and minister were parties, but not if merely the heritors and the patron." It has been settled that the presence of the minister is not necessary where

11. Where the proprietor insisted also for a sale of his teinds, the titular was obliged to sell them at nine years' purchase of the valued teind-duty; and upon receiving the price, to execute a disposition in the purchaser's favour, containing procuratory of resignation and precept of seisin, which the decreet-arbitral directs the granter to warrant only from his own fact and deed; but by 1663, c. 19, the extent of the warrandice is left to the discretion of the Commissioners. If the pursuer had a tack of his own teinds not yet expired, or if the defender was only tacksman of the teinds, and so could not give the pursuer an heritable right, an abatement of the price was to be granted accordingly by the Commissioners. This part of the decreet-arbitral, concerning the valuation and sale of teinds, was ratified in Parliament, 1633, c. 17, and

(31, 38)

the interests of the cure are represented by the titular; *Minister of Old Machar*, Feb. 28, 1868, 6 Macph. 504, rev. July 26, 1870, 8 Macph. (H.L.) 168; *Ferguson v. Gillespie*, Feb. 4, 1795, M. 15,768, aff. Feb. 17, 1797, 3 Pat. App. 534; *Duke of Gordon v. Gillan*, 1825, 1 W. & S. 295 (S. Teind Ca. 64); *Kirkwood v. Grant*, Nov. 7, 1865, 4 Macph. 4; see *Ministers of Islay v. Heritors*, July 16, 1868, 6 Macph. 1074. "Where the matter had not been litigated, but all parties concerned, including the minister, had agreed that the value of the teind should be taken at a certain amount, this was to receive the same effect as if the judgment of the Sub-Commissioners had proceeded, *causâ cognitâ*, on an actual proof of the amount of the teind. There were anciently a great many such valuations proceeding entirely on private agreements, and these, as likely to be attended with peril to the interests of the benefice, will now be closely examined. Indeed, it is obvious, more especially of late, that the Court in questions of approbation are disposed to deal very strictly with all valuations of the Sub-Commission, and to deny effect to all where there has been any departure from proper form."—But see *Deans of Chapel Royal*, Mar. 18, 1869, 7 Macph. (H.L.) 19. "If the value of the lands has been recently and suddenly increased, as by the erection of buildings, manufactories, or valuable enclosures, either the old rental as it stood prior to these will be taken, or a considerable deduction will be made from the existing rental in consequence of these improvements; see the whole matter fully discussed in the case of *Smith v. Officers of State*, Dec. 17, 1817, F.C. It is otherwise, however, when the lands have been not suddenly but *gradually* improved; in which case the titular is entitled to have them valued in their improved condition. The cases on the subject will be found laboriously collected in Buchanan's work on Teinds, pp. 200 to 203 (particularly with regard to the question what deductions will be allowed to the heritor

Commissioners were appointed for executing it by the same Parliament, c. 19.(h)

Certain teinds  
cannot be sold.

(37)

12. There is no provision in the decrees-arbital for selling the teinds granted for the sustentation of ministers, universities, schools, or hospitals; because these were to continue as a perpetual fund for the maintenance of the persons or societies to whom they were appropriated; and they are expressly declared not subject to sale by 1690, c. 30; 1693, c. 23. By the last of these Acts it is also provided that the teinds belonging to bishops, which had then fallen to the Crown upon the abolishing of Episcopacy, should not be subject to sale as long as they remained with the Crown not disposed of; nor those which the proprietor who had right both to stock and teind reserved to himself in a sale or feu of lands. But though none of these teinds can be sold, they may be valued.

The superiorities of erection belong to the King, unless the church-vassal chooses to hold his lands of the titular.

(28)

13. The King by the decrees-arbital declared his own right to the superiorities of erection which had been resigned to him by the submission, reserving to the titulars the feu-

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in calculating the amount of teindable value). Besides the objections arising from the decree itself, or the circumstances under which it has been obtained, there are others which, assuming the original validity of the decree, have been pleaded as excluding a decree of approbation. The first is *dereliction*, i.e., that the holder of the decree has tacitly abandoned it by a course of conduct inconsistent with the idea that he intended to stand on it as establishing a valuation. In order to succeed in this defence, the objector requires to show clearly a series of payments made by the holder of the decree beyond the amount of the valued teind, and under circumstances plainly inferring an intention to depart from the sub-valuation. The defence, that the sub-valuation has been lost *non utendo*, is often united with and complicated with that of dereliction; but standing by itself, it has long been settled that such an objection cannot be sustained; Ersk. iii. 7, 11. It will be kept in view that the decree of the High Commission could not be lost or derelinquished by over-payments, or lapse of time, or contrary usage. This has been repeatedly decided; and the earlier cases are referred to in the case of *Anderson v. Blair*, July 3, 1816, F.C.—MOIR. As to dereliction, see *Fogo v. Colquhoun*, Dec. 6, 1867, 6 Macph. 105.

(h) The limitation in this statute of the right to pursue a sale of teinds to a period of two years from the valuation is not now in force; *Irvine v. Maule*, 1794, M. 15,698.

duties thereof, until payment by himself to them of one thousand merks Scots for every chalder of feu-victual, and for each hundred merks of feu-duty (ratified 1633, c. 14); which right of redeeming the feu-duties was renounced by the Crown, 1707, c. 11. If the church-vassal should consent to hold his lands of the titular, he cannot thereafter recur to the Crown as his immediate superior, 1661, c. 53.

14. His Majesty referred what interest the Crown ought to have in the teinds of erected benefices to the Commissioners; who determined an annuity to be paid out of them to the Crown of about six per cent. (ratified 1633, c. 15). This right, not having been annexed, was conveyed to one Livingston in security of a debt; but in 1674 the exercise of it was suspended by the Crown; since which time it has lain dormant; Stair, ii, 8, § 13. (39)

Annuity of teinds.

15. In explaining what the constant rent is by which the teind must be valued, the following rules are observed. The rent drawn by the proprietor from the sale of subjects that are more properly parts of the land than of the fruits, *e.g.*, quarries, minerals, mosses,<sup>(i)</sup> &c., is to be deducted from the rental of the lands (*Heritors of Cadder v. Mins. of Glasgow*, Dec. 11, 1734, M. 15,739, Elch. "Teinds"); and also the rent of supernumerary houses, over and above what is necessary for agriculture; and the additional rent that may be paid by the tenant in consideration of the proprietor's undertaking any burden that law imposes on the tenant, *e.g.*, upholding the tenant's houses (*ibid.*): because none of these articles are paid properly on account of the fruits. Orchards must also be deducted; *Hay v. Roxburgh*, M. 15,750; and mill-rent, because the profits of a mill arise from industry; and the corns manufactured there suffer a valuation, as rent payable by the tenant, and therefore ought not to be valued a second time against the proprietor as mill-rent. The yearly expense of culture ought not to be deducted; for no rent can be (32)

Rules for fixing the rent in the valuation of teinds;

Rent of quarries, &c., not teindable;

nor of orchards, nor mill-rent;

(i) This deduction has place only when the tenant has right to sell the peats; *Peterkin v. E. Moray*, 1801, M. App. "Teinds," 11. Compare *Paul v. Heritors of Banchory-Devenick*, Feb. 3, 1865, 3 Macph. 482, on appeal May 14, 1867, 5 Macph. (H.L.) 62; July 2, 1869, 7 Macph. 967, aff. June 22, 1871, 9 Macph. 121.

nor rent improved at an extraordinary expense.

produced without it (*Feuars of Dalkeith v. D. Buccleuch*, Feb. 6, 1745, M. 15,745): but if an improvement of rent is made at an uncommon expense, *e.g.*, by draining a lake, the proprietor is allowed a reasonable abatement on that account; *Heritors of Cadder v. Glasgow College*, July 18, 1739, M. 15,740.(k)

Teinds not disposed of,

(49)

now redeemable by the patron from the beneficiary.

16. Notwithstanding the several ways of misapplying parochial teinds in the times of Popery, some few benefices remained entire in the hands of the parsons. The ministers planted in these after the Reformation continued to have the full right to them as proper beneficiaries; but by Acts 1690, c. 23, and 1693, c. 25, a power is granted to the patron to redeem the whole teind from such beneficiaries, upon their getting a competent stipend modified to them; which teind, so redeemed, the patron is obliged to sell to the proprietor at six years' purchase.

In what order teinds are subject to allocation for stipend.

(51, 52)

17. Some teinds are more directly subject to an allocation for the minister's stipend than others. The teinds in the hands of the lay-titular fall first to be allocated, who, since he is not capable to serve the cure in his own person, ought to provide one who can: and if the titular, in place of drawing the teind, has set it in tack, the tack-duty is allocated: this sort is called *free teind*. Where the tack-duty, which is the titular's interest in the teinds, falls short, the tack itself is burdened, or, in other words, the surplus teind over and above the tack-duty: but in this case the commissioners are empowered to recompense the tacksman, by prorogating his tack for such a number of years as they shall judge equitable;

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(k) Where the rent is increased by recent improvements, the former rent is the test for valuation; but the practice seems to be to allow a deduction on this account only where the improvements have been made within seven years; *Maxwell v. Coll. of Glasgow*, Feb. 6, 1745, M. 15,744; *Smyth v. Officers of State*, Dec. 17, 1817. But no deduction is made for improvements made in the ordinary course of cultivation; *E. Selkirk v. Officers of State*, 1802, M. 15,778; or for adventitious and temporary circumstances increasing the rent stipulated for the subjects by the current lease; *Campbell v. Coll. of Glasgow*, June 21, 1815, F.C. The lease is generally, though not invariably, the criterion of value, even where the lands are held by tacit relocation; *Carrick v. Coll. of Glasgow*, 1804, M. 15,782; *Caddel v. Burns*, June 10, 1827, S. T. C. 129.

1690, c. 30 ; 1707, c. 9. Where this likewise proves deficient, the allocation falls on the teinds heritably conveyed by the titular, unless he has warranted his grant against future augmentations ; in which case the teinds of the lands belonging in property to the titular himself must be allocated in the first place.

18. Where there is sufficiency of free teinds in a parish, the titular may allocate any of them he shall think fit for the minister's stipend, since they are all his own ; unless there has been a previous decree of locality : and this holds though the stipend should have been paid immemorially out of the teinds of certain particular lands. This right was frequently abused by titulars, who, as soon as a proprietor had brought an action of sale of his teinds, allocated the pursuer's full teind for the stipend, whereby such action became ineffectual : it is therefore provided by 1693, c. 23, that after citation in a sale of teinds, it shall not be in the titular's power to allocate the pursuer's teind solely, but only in proportion with the other teinds in the parish.

Titular may allocate any of the teinds if there is no locality ;

(53)

but not after citation in any sale of teinds.

19. Ministers' glebes are declared free from the payment of teinds, 1578, c. 62 ; 1621, c. 10.(l) Lands *cum decimis inclusis* are also exempted from teind. These were, according to Mackenzie, h. t., § 6, the lands which had been feued out prior to the above-recited Lateran Councils(m) (which prohibited the infeudation of teinds to laics) by churchmen who had right both to stock and teind : whereby the teinds were consolidated with the stock, and were never afterwards separated from it. Sir Thomas Craig, who is of opinion that we had no infeudation of teinds so early, understands by that expression all lands where the churchmen who had right both to stock and teind, and came afterwards to feu out the lands (which they were allowed to do by 1457, c. 71), included the teind in the same charter with the stock, without distinguishing whether such right was prior or posterior to

Ministers' glebes, and lands *cum decimis inclusis*, are exempted from teind.

(16)

(l) Even though feued out to laymen ; *Cranstoun v. Elliot*, 1800, M. App. "Stipend," 3. But lands mortified by a private individual as a glebe for the minister of a parish and his successors are not teind-free ; *Wilson v. Agnew*, Feb. 1, 1831, 9 S. 357.

(m) *Supra*, § 3.

the Lateran Councils. And agreeably to this last opinion, it has been adjudged sufficient to exempt lands from payment of teind that the proprietor proved his right thereto *cum decimis inclusis*, as far back as the Act 1587, c. 29, which supposes all such rights to be valid; *Min. of Tulliallan v. Colvill*, M. 15,717; *Arrot v. Dempster*, Dec. 7, 1737, Elch. "Teinds," 8. Lands which formerly belonged to the Cistercians, or rather privileged orders, are not now exempted from teind (*Min. of Barry*, June 15, 1737, M. 15,721); either because the privilege having been given to the monks, as *pauperes*, was deemed personal, and so not transmissible to the laic titulars, or because it was limited to lands which these orders were then possessed of; and it does not appear that they had property in Scotland so early as the papal grant of exemption.(n)

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(n) The text of this title is inaccurate. The law is thus stated by Lord Benholme:—"Church-lands, as a general rule, paid teind to the parochial incumbent as much as any others (with the exception of glebe-lands). But exceptions gradually sprang up. Lands rescued from the desert by the personal labour of religious houses were held exempted from paying teind out of the fruits which their industry thus created; and the Cistercian order of monks" (also Templars and Hospitallers—cases cited below) "came to possess a similar exemption for all their lands, conceded to them through the great favour and influence which they had gained with the Popes of the twelfth century, and the more readily recognised from the usage of that monastic order to settle in swamps and forests which they reclaimed from sterility. The exemptions thus enjoyed for these privileged church-lands were naturally sought to be transferred along with them when they were feued out; and the vassals were allowed by the law to continue the exemption, subject to these conditions—(1) That they showed a title from the church importing the exemption; (2) that the exemption bore that the lands were granted *cum decimis inclusis*, meaning that the teind had no separate existence, but was merged in the stock; and (3) that the title also bore that this consolidation or incorporation was not a recent act, but had existed always, or for time immemorial, *cum decimis inclusis*, and *nunquam antea separatis*. Not that precisely these or identical words were required for this purpose as matter of solemnity, but at least equivalent words were indispensable. . . . It was not uncommon that church corporations held their teinds and lands by separate titles, acquired at different times, in which case the ground of the privilege never existed, and could not be communicated. The mere statement that the teind and stock had never been

20. Teinds are *debita fructuum*, not *fundi*; for as by their first condition the beneficiary might, if he used the proper diligence, make them effectual by drawing them out of the several crops, he needed no real security. The action, therefore, for bygone teinds is only personal against those who have intermeddled, either with the teind by itself, or with stock and teind jointly, unless where the titular is infeft in the lands in security of the valued teind-duty.<sup>(o)</sup> Where a tenant is by his tack bound to pay a joint duty to his landlord for stock and teind, without distinguishing the rent of each, his defence of a *bond fide* payment of the whole to the landlord has been sustained in a suit at the instance of a laic titular (*Murray v. Intromitters*, March 21, 1628, M. 1780); but repelled where a churchman was pursuer; *Kirk v. Gilchrist*, Feb. 19, 1629, M. 14,786. In both cases the proprietor who receives such rent is liable as intermeddler. Every person having right to teinds, whether churchman or laic titular, has an hypothec upon the fruits for the payment of his teind (*Vernor v. Allan*, June 24, 1662, M. 14,788; *Bishop of the Isles v. Hamilton*, Dec. 13, 1664, M. 15,633); but a purchaser *bond fide*, at a public market, is secure; *Reid v. Melvil*, Dec. 20, 1664, M. 15,634.<sup>(p)</sup>

Teinds are  
*debita fructuum*  
not  
*fundi*.

(42)

Hypothee on  
the fruits for  
the teind.

(44)

21. In tacks of teinds, as of lands, there is place for tacit inhibition of teinds.

(45)

separated would not be conclusive. If it appeared from the title itself that the teind and stock had ever to any purpose been regarded or treated separately, if they came by separate titles, if they were held by separate reddendos, if any special burden had ever been laid on the one which was not laid on the other,—these, or other such circumstances, would go to contradict and nullify the assertion of the two having never been separated. The want of the word *inclusis* seems to raise a suspicion of that kind, and if not supplied by any equipollent, would seem either to be fatal to the claim of exemption, or at least to open a way for a full inquiry into the true history of the case;” *E. Dalhousie v. Somers*, July 15, 1864, 2 Macph. 1349. See also *D. of Athol's Trs. v. Com. Agt. in Loc. of Caputh*, June 3, 1864, 2 Macph. 1133; *Ochterlony v. Com. Agt. of Carmyle*, May 23, 1810, F.C.; *Hay v. Com. Agt. of Alyth*, Feb. 7, 1810, F.C.; *Officers of State, v. Stewart*, July, 1858, 20 D. 1331.

(o) The titular is not entitled to demand such infeftment; *Scott v. College of Glasgow*, 1796, M. 15,696.

(p) There can be no hypothec for tithe after valuation; Inst. l. c.

relocation;(q) to stop the effect of which the titular must obtain and execute an inhibition of teinds against the tacksman, which differs much from inhibition of lands (explained under the next title), and is intended merely to interpel or inhibit the tacksman from farther intermeddling.(r) But if the titular shall, after inhibition, summarily turn out the tacksman, without a previous sentence, he is liable in a spuilzie; *L. Berford v. Kingstoun*, Jan. 27, 1665, M. 1817. This diligence of inhibition may also be used, at the suit of the titular, against any other possessor of the teinds; and if the tacksman or possessor shall intermeddle after the inhibition is executed, he is liable in a spuilzie.(s)

In what case does a grant of lands include the teinds.

(40, 41)

22. Lands and teinds pass by different titles. A disposition of lands, therefore, though granted by one who has also a right to the teinds, will not carry the teinds, unless it shall appear from special circumstances that a sale of both was designed by the parties; *Callendar v. Carruthers*, June 29, 1698, M. 15,649. But if a proprietor who has right to his teinds, and who consequently carries his whole corns, without distinguishing between stock and teinds, to the same mill, should astrict his lands, the intention of parties is presumed that the astriction should reach to both. In lands *cum decimis inclusis*, where the teinds are consolidated with the stock, the right of both must necessarily go together in all cases.

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(q) Which has the same effect in localling as a current lease; *Hops v. Common Agent of Cupar*, Nov. 28, 1834, 13 S. 106.

(r) Tacit relocation is not prevented by citation, but only by decree obtained in an action for payment of the free teind; *Earl of March v. Leishman*, 1765, M. 15,324; *Scott v. Ancrum Heritors*, 1795, M. 15,700.

(s) Intimation without inhibition is sufficient to put the proprietor on his guard where he has no tack; *Wallace v. Portland*, May 16, 1828, 6 S. 808. If the tacksman continues to possess the teinds and pay the old tack-duty after an inhibition has been used and an action of spuilzie is in dependence, the effect of the inhibition flies off, and it is held to be derelinquished; *Sol. of Tithes v. E. Fife*, 1799, M. App. "Teinds," 5; *Trinity Hospital v. Common Agent of South Leith*, Dec. 20, 1848, 11 D. 266; *Lord Adv. v. Skene*, March 15, 1860, 22 D. 987.

## TIT. XI.—OF INHIBITIONS.

1. The constitution and transmission of feudal rights being explained, and the burdens with which they are chargeable, it remains to be considered how these rights may be affected at the suit of creditors, by legal diligence. Diligences are certain forms of law, whereby a creditor endeavours to make good his payment, either by affecting the person of his debtor, or by securing the subjects belonging to him from alienation, or by carrying the property of these subjects to himself. They are either real or personal. Real diligence is that which is proper to heritable or real rights; personal is that by which the person of the debtor may be secured, or his personal estate affected. Of the first sort we have two—(1.) Inhibition, and (2.) Adjudication, which law has substituted in the place of apprising. (1)

2. Inhibition is a personal prohibition, which passes by letters under the signet, prohibiting the party inhibited to contract any debt or do any deed by which any part of his lands may be aliened or carried off in prejudice of the creditor inhibiting. (a) It must be executed against the debtor personally, or at his dwelling-house, according to the order prescribed in the case of summonses by 1540, c. 75, and thereafter published and registered in the same manner with interdictions, 1581, c. 119, No. 1; 1600, c. 13 (i. 7, 33). Though this diligence requires registration to complete it, yet it secures the creditor who inhibits against all deeds of alienation, even onerous ones, that are granted posterior to the publication of the letters (iv. i. 15), provided he shall, within the time statuted, proceed to perfect his diligence by registration; *Cruickshank v. Watt*, 1675, M. 8393; *Gartshore v. Cockburn*, 1686, M. 1051. (b) (2, 4-7)

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(a) Inhibition in security of a future debt is incompetent, unless the debtor is *vergens ad inopiam* or *in meditatione fugæ*; *Dove v. Henderson*, Jan. 11, 1865, 3 Macph. 339; *Symington v. Symington*, Dec. 3, 1875, 3 R. 206.

(b) Inhibition is not now published to the lieges except by registra-

The grounds of inhibition.

(3, 8)

Inhibition on a dependence.

Inhibitions not granted of old nisi causâ cognita.

Inhibition limited to heritage.

(9, 10)

3. Inhibition may proceed either upon a liquid obligation, or even on an action commenced by a creditor for making good a claim not yet sustained by the judge; which last is called inhibition upon a depending action. The summons which constitutes the dependence must be executed against the debtor before the letters of inhibition pass the signet; for no suit can be said to depend against one till he be cited in it as a defender; *Rosehill v. Thomson's Crs.*, 1714, M. 6958.(c) But the effect of such inhibition is suspended till decree be obtained in the action against the debtor, and in the same manner, inhibitions on conditional debts have no effect till the condition be purified. Inhibitions, as they carry with them a certain degree of reproach, were not granted by the old practice without a trial of the cause; which is still necessary when they proceed on conditional debts; *Weir v. Deuchar*, July 17, 1713, M. 7016. And though in other cases inhibitions now pass of course, the Lords are in use to stay them, or, if they have passed the signet, to recall them, either on the debtor's showing cause why the diligence should not proceed (*Murray v. Kelly*, Feb. 15, 1699, M. 7014); or even *ex officio*, without the debtor's appearance, where the ground of the diligence is doubtful; *Wishart petr.*, Feb. 9, 1706, M. 7015.(d)

4. Though inhibitions, by their uniform style, disable the

tion in the General Register of Inhibitions, and its effect begins with registration of the inhibition, or of a notice thereof, which may be recorded before or after execution against the debtor, provided that the inhibition itself is recorded within twenty-one days after the registration of the notice; 31 & 32 Vict. c. 101, § 155. Notice of summons of reduction of conveyances of lands must also be entered in this Register in order to render the lands litigious. See also below, note (e), and ii. 12, § 10 (note).

(c) The warrant of inhibition may be inserted in the will of the summons, and executed at the same time as the summons, or at any time thereafter; 31 & 32 Vict. c. 100, § 18.

(d) Inhibitions are frequently recalled on caution for the debt being given; but inhibition on a debt actually due and vouched by a decree, charge, or liquid document, cannot be recalled; *Blackwood v. Marshall*, 1749, M. 6982, Elch. "Inhib." 10; *Royal Bank v. Bank of Scotland*, 1728, M. 875, rev. Cr. & St. 14.

debtor from selling his moveable as well as his heritable estate, their effect has been long limited to heritage, from the interruption that such an embargo upon moveables must have given to commerce (*L. Braco v. Ogilvy*, March 22, 1623, M. 7016); so that debts contracted after inhibition may be the foundation of diligence against the debtor's person and moveable estate. The arrears remaining due on a *debitum fundi* to a person inhibited, though they be heritably secured, are moveable, and therefore do not fall under the inhibition; *Scott v. Coutts*, 1750, M. 7988. An inhibition secures the inhibitor against the alienation, not only of the lands that belong to his debtor when he was inhibited, but of those that he shall have afterwards acquired (*Ellies v. Keith*, Dec. 15, 1663, M. 5987); but no inhibition can extend to such after-purchases as lie in a jurisdiction where the inhibition was not registered; for it could not have extended to these though they had been made prior to the inhibition.<sup>(e)</sup>

It affects after acquisitions.

5. This diligence only strikes against the *voluntary* debts or deeds of the inhibited person. It does not restrain him from granting necessary deeds, i.e., such as he was obliged to grant anterior to the inhibition, since he might have been compelled to grant these before the inhibitor had acquired any right by his diligence.<sup>(f)</sup> By this rule a wadsetter or annualrenter might, after being inhibited, have effectually renounced his right to the reverser on payment, because law could have compelled him to it (*Maclellan v. Mushet*, Jan. 7, 1680, M. 571); but to secure inhibitors against the effect of such alienations, it is declared by Act S., Feb. 19, 1680, that after intimation of the inhibition to the reverser, no

It does not strike against necessary deeds;

(11, 12)

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(e) Inhibitions are now recorded only in the General Register of Inhibitions, &c., the particular registers being abolished, 31 & 32 Vict. c. 64, § 16; and they do not affect lands acquired by the debtor after their registration, 31 & 32 Vict. c. 101, § 157; unless at that date they were destined to the debtor by an entail or other indefeasible title.

(f) So it is not a bar to infeftment being taken on a voluntary conveyance prior in date to the inhibition; nor to acts of ordinary administration, such as the granting of a lease of ordinary duration; *Bell's Com.* i. 150.

nor against  
judicial rights.

renunciation or grant of redemption shall be sustained, except upon declarator of redemption brought by him to which the inhibitor must be made a party. Judicial rights, *e.g.*, adjudications recovered against the inhibited person after the inhibition, upon debts contracted prior thereto, are not hurt by that diligence; for these are truly the deeds of the law, not of the person inhibited; but an adjudication led on a bond voluntarily granted after inhibition is reducible.

It is simply  
prohibitory.

(13, 2)

6. An inhibition is a diligence simply prohibitory, so that the debt on which it proceeds continues personal after the diligence; and consequently the inhibitor, in a question with anterior creditors whose debts are not struck at by the inhibition, is only preferable from the period at which his debt is made real by adjudication: and where debts are contracted on heritable security, though posterior to the inhibition, the inhibitor's debt being personal, cannot be ranked with them: he only draws back from the creditors ranked the sums contained in his diligence. *(g)* The heir of the person inhibited is not restrained from alienation by the diligence used against his ancestor; for the prohibition is personal, affecting only the debtor against whom the diligence is used. *(h)*

Reductions *ex capite inhibitionis*, founded solely in the inhibitor's interest.

(14, 15, 16)

7. Inhibitions do not of themselves make void the posterior debts or deeds of the person inhibited; they only afford a title to the user of the diligence to set them aside if he finds them hurtful to him; *(i)* and even where a debt is actually

*(g)* He will do this as against posterior creditors where the prior debts exhaust the estate, even although these posterior creditors by adjudging within year and day of the adjudication of the prior creditor are ranked under the statute *pari passu* with him, and preferably to the inhibitor. This is on the ground that inhibition, being only a negative or prohibitory diligence, can neither be prejudiced nor benefited by a transaction *spretâ inhibitione*; and the *pari passu* preference of adjudications is intended only to benefit subsequent adjudgers, and has no effect on creditors relying on a different diligence; *Miln v. Nicolson's Crs.*, 1697, M. 2876; *Campbell v. Gordon*, Feb. 26, 1841, 3 D. 629, rev. Aug. 2, 1842, 1 Bell's App. 571.

*(h)* *Roberts v. Potter*, May 14, 1829, 7 S. 611.

*(i)* Yet where a debtor sells his lands in contempt of the inhibition, and the purchaser is infert, the inhibition is equivalent to a real incumbrance on the lands, and is preferable to prior creditors adjudging after the purchaser's infertment, without the necessity of further diligence at

reduced *ex capite inhibitionis*, such reduction, being founded solely in the inhibitor's interest, is profitable to him alone, and cannot alter the natural preference of the other creditors. Hence, where several infestments of annualrent of different dates have been granted by the debtor after inhibition, for the payment of all which the debtor's estate is not sufficient, though the inhibitor cannot be hurt by any of the posterior contractions, and consequently must draw back his whole rent from the annualrenters, yet the deficiency in the fund of payment must fall, not on the whole of them, *pro rata*, but upon the least preferable; *Lithgow v. Crs. of Whitehaugh*, 1747, M. 6974. Hence also, debts, though contracted after inhibition, are not reducible where the inhibitor would have been totally excluded from the debtor's funds by debts preferable to his own, though these posterior contractions had not been made.

8. Inhibitions may be reduced upon legal nullities, arising either from the ground of debt or the form of the diligence. Purging of inhibition.  
When payment is made by the debtor to the inhibitor, the inhibition is said to be purged. Any creditor whose debt is struck at by the inhibition may, upon making payment to the inhibitor, compel him to assign the debt and diligence in his favour, that he may make good his payment the more effectually against the debtor.(j) (17)

#### TIT. XII.—OF COMPRISINGS AND ADJUDICATIONS.

1. Heritable rights may be carried from the debtor to the creditor, either by the diligence of apprising (now adjudi-

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the instance of the inhibitor. The reason is, that the sale and infestment are good against all other creditors who have not previously adjudged or inhibited, and yet null as to the inhibitor, who might therefore reduce the sale and adjudge. The purchaser, therefore, may retain the price until the inhibition is purged; *Monro v. Gordon*, 1777, M. App. "Inhib.," 1; *McLure v. Baird*, 1807, M. App. "Compet.," 3; Bell's Com. ii. 148.

(j) Inhibitions prescribe in five years, but may be renewed by again recording them, or by recording a memorandum of renewal; Conveyancing Act, 1874, § 42.

Apprisings,  
(1, 2, 3)

cation), or by a judicial sale carried on before the Court of Session. Apprising or comprising was the sentence of a sheriff, or of a messenger who was specially constituted sheriff for that purpose, by which the heritable rights belonging to the debtor were sold for payment of the debt due to the appraiser. By the Roman law the debtor's moveable estate was first taken into execution, and if that was not sufficient, his immoveable; l. 15, § 2, *de re jud.* (42, 1). In the same manner, the debtor's moveables were, by our old law, to be first distrained on a brief of distress; and, in default of these, as much of his heritage was to be sold as would satisfy the creditor; St. Alex. II. c. 24; so that apprisings were, by their original constitution, proper sales of the debtor's lands to any purchaser who offered. (a) If there was not enough for the creditor's payment within the territory of that sheriff who was first applied to, the Crown issued letters to other sheriffs, who were to pursue the same method with the first (1469, c. 37). If no purchaser could be found, the sheriff was to apprise or tax the value of the lands by an inquest (whence came the name of apprising), and to make over to the creditor lands to the value of the debt.

were originally  
proper sales.

Form of deduc-  
ing apprisings.

(4, 5)

2. Soon after the Act 1469, all letters of apprising issued from the King's Signet, and were directed to messengers as sheriffs in that part. The messenger who was employed searched first for moveables, and upon finding none, denounced the lands to be appraised, *i.e.*, made publication of the intended apprising upon the grounds of the lands, and at the market-cross of the jurisdiction where the lands lay, and left copies of the execution at both places. The letters were also to be executed against the debtor, personally or at his dwelling-place, fifteen days before the actual apprising. By the decree following upon this diligence, such a proportion of the debtor's lands was adjudged to the proprietor as was taxed by the inquest to amount to the principal sum and penalty contained in the debt, and to the messenger's sheriff-fee (i. 4, § 18); but the appriser got nothing in name of interest before the Reformation. In course of time, all

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(a) *Vide* Lord Kames's "Hist. Law Tracts," Appendix, No. 6.

apprisings were led at Edinburgh, whereby persons came frequently to be put on the inquest, utter strangers to the value of the lands; which soon introduced the custom of apprising the whole lands belonging to the debtor, without comparing their value with the extent of the debt. Seven years were, by the Act 1469, allowed to the debtor to redeem the lands appraised (called the *legal reversion*, or the *legal*); but a minor may redeem at any time within his age of twenty-five (1621, c. 6), whether he himself be the original debtor, or whether he succeed as heir to the debtor: and where a major succeeds to a minor, against whom the legal of seven years was expired at his death, the major's right of reversion is prorogated for year and day thereafter.

The legal reversion of appraisings runs not against minors.

(10)

3. Though letters of apprising contained a power to poid moveables, nothing was *de facto* appraised by the messenger but heritable rights. Personal rights of lands may be appraised, and tacks where assignees are not specially excluded; and even bare faculties or powers competent to a debtor, *e.g.*, a faculty to reduce a deed granted by a minor to his prejudice (Steuart's Ans., *voce* "Adjudications"); for every pecuniary or patrimonial interest belonging to debtors ought to be subjected to the diligence of creditors. (b) Offices of trust conferred on personal considerations cannot be appraised; because

What subjects can be appraised.

(6)

What offices can be appraised.

(7, 8)

(b) It is incompetent to adjudge a mere *spes successionis*; *Beatson v. McDonald*, June 7, 1821, 1 S. 49; or the power to sell lands held under the old law by an entail defective in the prohibition against sale, that not being properly a faculty. Opinions in *Cochrane v. Bogle*, March 2, 1849, 11 D. 908, aff. 7 Bell's App. 65. But the radical or reversionary right of a truster under a conveyance of lands in trust is adjudgeable; *Campbell v. Campbell's (of Edderline) Crs.*, 1801, M. App. "Adjud." 13, 1 Ross's L. C. 458; *Giles v. Lindsay*, Feb. 27, 1844, 6 D. 771. Also the life interest of the proprietor of an entailed estate; *Grahame v. Hunter*, Nov. 14, 1828, 7 S. 13; and the *jus mariti* of a husband in his wife's estate; *Smith v. Frier*, Feb. 7, 1857, 19 D. 384. Where the deed is not granted by the beneficiary, but his right arises from the deed only, the nature of the diligence to be used depends on the question whether his interest is heritable or moveable. Thus, if the beneficiary's right is to a share of heritage which there is no power to sell, adjudication will be the competent and proper diligence; *Learmont v. Shearer*, March 3, 1866, 4 Macph. 540; see above, ii. 2.

in these there is a *delectus personarum*, not communicable to creditors by diligence: but all offices are appraisable which either pass by voluntary conveyance, or are so annexed to lands that they are made descendible to the same heirs; *Cockburn v. Cockburn*, 1747, M. 150 and 157. An appraising, whether of lands, or of a right of annualrent, or other *debitum fundi*, carries no past arrears due upon such right prior to the decree of appraising; for though these are heritably secured they are moveable subjects; *Macghie v. Livingston*, March 13, 1627, M. 136.

On what debts  
can appraising  
proceed.

- (9) 4. The debt on which the appraising proceeds must be either liquid in itself, or liquidated by a sentence to a certain value in money, before leading the diligence; that the precise sum may be known, upon payment of which the debtor can redeem. It must also be a debt the term of payment whereof is already come; for till then no creditor can appropriate to himself his debtor's estate; see *Gordon v. Hunter*, Feb. 11, 1680, M. 170.

(15)

Appraising up-  
on a charge to  
enter heir.

5. That creditors may have access to affect the estate of their deceased debtor, though the heir should stand off from entering, it was made lawful, by 1540, c. 106, for any creditor to charge the heir of his debtor to enter to his ancestor, year and day being past after the ancestor's death, (c) within forty days after the charge; and if the heir fails, the creditor may proceed to apprise the debtor's lands as if the heir had been entered. Custom has so explained this statute that the creditor may charge the heir immediately after the death of his ancestor, provided letters of appraising be not raised till after the expiry both of the year and of the forty days next ensuing the year, within which the heir is charged to enter; Act S., Feb. 18, 1721; *Couper's Reprs. v. Skelbo's Crs.*, 1752, M. 267. (d) But this statute relates only to such charges on

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(c) Actions of constitution and adjudication against apparent heirs may be insisted in at any time within six months after their becoming apparent heirs; 31 & 32 Vict. c. 101, § 62.

(d) Observe that such charges were abolished in 1847, the execution of a summons of constitution of an ancestor's debt being now equivalent to a general charge, the *induciae* of which expire with the *induciae* of the summons; and the execution of a summons of adjudication being

which apprising is to be led against the ancestor's lands; for in those which are to be barely the foundation of a common summons or process against the heir, action will be sustained if the year be elapsed from the ancestor's death before the execution of the summons, though the forty days should not be also expired; *Macculloch v. Marshall*, June 19, 1628, M. 2168. Though the statute authorises such charges against majors only, practice has also extended it against minors. The provision of this statute is, by 1621, c. 27, extended to the case where the heir is the debtor. One must, in this matter, distinguish between a general and a special charge, though no distinction is made in these statutes. A general charge serves only to fix the representation of the heir who is charged, so as to make the debt his which was formerly his ancestor's; but a special charge makes up for the want of a service (explained iii. 8, § 29), and states the heir, *fictione juris*, in the right of the subjects to which he is charged to enter. Where, therefore, the heir is the debtor, a general charge for fixing the representation against him is unnecessary, since the only concern of the creditor is, that his debtor makes up titles to the ancestor's estate, which is done by a special charge; but where the deceased was the debtor, the creditor must first charge his heir to enter in general, that it may be known whether he is to represent the debtor; if he does not enter within forty days, the debt may be fixed against him by a decree of constitution, on which he must be charged to enter heir in special, upon forty days more; and these must be elapsed before the creditor can proceed to apprise.

Charge either  
general or  
special.

(12, 13, 14)

6. Apprisings, being transmissions of heritable rights, must be perfected by seisin.(e) The superior of the lands

Apprisings  
were perfected  
by seisin.

(17, 24)

equivalent to a special charge or general special charge, and the *inducias* expiring in like manner; 31 & 32 Vict. c. 101, § 60; see below, § 18.

(e) The Lands Transference Act, 1847, provided that decrees of adjudication and of sale might contain a warrant for infeftment equivalent to a precept of sasine. But now the adjudging creditor or the purchaser may complete his title by recording the decree in the Register of Sasines, with or without a notarial instrument, or by obtaining a charter of adjudication or of sale on which he may be infeft; or, if the party taking infeftment be not the original adjudger, he may complete his title in any

The superior  
must enter the  
appriser for a  
year's rent.

apprised is obliged, by 1469, c. 37, to enter apprisers on payment of a year's rent; which holds, though himself should claim the lands on an exclusive title (*Black v. Pitmedden*, July 17, 1632, M. 201); but his entry on a charge, being an act of obedience, can hurt no former right competent to him. Though there should be many apprisings, the superior gets but one year's rent for all of them, from which the real burdens affecting the lands, arising either from law or the consent of the superior, must be deducted. If the debt due to the appriser be small in proportion to the value of the lands, the composition is brought lower *ex æquitate*; *Pater-son v. Murray*, March 30, 1637, M. 15,055. Where the Crown is superior, no more is exacted from the appriser than one per cent. of the principal sum appraised for, when it is below 10,000 merks Scots, though that composition should be lower than the sixth part of the valued rent exacted from singular successors by voluntary purchase. Where the principal is above 10,000 merks, the composition falls to a half per cent.

Allowance of  
apprisings.

(25, 26)

7. Where the superior refused to enter the appriser, the appraising was by the ancient practice approved or allowed by the Court of Session (*Hope*, Min. Pr. 109), upon which allowance three consecutive precepts were directed to the superior, commanding him to enter the appriser (*Craig*, 457, § 20), which were no other than the ancient letters of four forms (arg. 1647, c. 43); and, if he still refused, application was made to the immediate higher superior, and so upwards to the Sovereign, who refuses none: but now, by long usage, founded on the said Act 1647, a simple charge of horning against the superior has been substituted in place of the letters of four forms.(g) All apprisings, without distinction,

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of the ways competent to the assignee of an unrecorded conveyance; 31 & 32 Vict. c. 101, § 62. An adjudger of an heritable security completes his right by recording either the abbreviate of adjudication, or the decree, in the appropriate Register of Sasines; *ib.* § 129.

(g) A decree of adjudication or sale in the form prescribed by the Titles to Lands Consolidation Act, 1868, has the effect of a conveyance of the lands by the ancestor, owner or seller, and the holder may charge the superior under the powers contained in the Act to grant entry by confir-

and not those only where the superior was refractory, were, by 1641, c. 54 (revived by 1661, c. 31), ordained to be allowed by the Lords; and the allowance, containing a note of the parties' names, of the debt, and of the lands, was to be registered in a record to be kept by the clerk of register.

8. After the Reformation, creditors were not only entitled to their principal sums, but to the past interest due upon them; which principal and interest were, in the case of apprising, accumulated by the decree into one sum, carrying interest to the appriser during the not-redemption of the lands. Apprisers, therefore, being truly purchasers under redemption,<sup>(h)</sup> enjoy the rents of the appraised lands, in satisfaction or *in solutum* of the interest of this accumulate sum, in case they choose to possess during the legal; until, by 1621, c. 6, they became obliged to apply the rents, in so far as they exceeded the interest of their debt, towards extinction of the principal sum; which is extended in the case of a minor debtor to the surplus rents during his authority, by 1663, c. 10. On the other part, if the rents fall short of the appriser's interest, the redemption is burdened with the arrears remaining unpaid. An appriser who enters into possession in virtue of a decree, is accountable to the debtor as if he had continued to possess till the expiring of the legal, though he should have quitted the possession immediately after his entry; because the decree bars all others from intermeddling. If the smallest part of the debt or interest remains due at the expiration of the legal, the property of the whole estate is, in strict law, carried irredeemably from the debtor.

Apprisers are accountable for the surplus rents during the legal.

An appriser who has begun to possess is accountable, as if he had continued.

9. As apprisings are truly sales under reversion,<sup>(h)</sup> in

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mation. The superior's right to the composition is reserved entire, and the adjudger, by taking infeftment on the decree, becomes liable for it; 31 & 32 Vict. c. 101, §§ 60, 97, *et seq.*, and 32 & 33 Vict. c. 116, § 5.

(A) The change which has taken place in the character of the apprising or adjudication, and the theories of lawyers concerning it, is thus described by Baron Hume in his Lectures, as quoted by Professor Moir, from short-hand notes taken in 1819:—"Formerly an apprising was just a judicial sale or poiding of an heritable estate; it was an absolute judicial sale of as much of the land as would pay the debt. After the introduction of the

The bygone  
interest of the  
accumulated  
sum falls not  
under  
executry.

(45, 46)

payment of the appriser's claim, the arrears of interest due on the accumulate sum are not so properly a debt upon the reverser as a burden upon his right of reversion; these arrears do not therefore descend upon the appriser's death to his executors, but to his heir, as a part of the right of property constituted by the apprising; *Ramsay v. Brownlie*, Feb. 3, 1738, M. 211, 5538, Elch. "Adjud.," 20. The exec-

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power of redemption by 1469, it still continued to be a sale, but under reversion, *in solutum* of the claim. During his possession the appriser enjoyed the rents of the subject, and when it was redeemed from him, he received back his price, or more properly the original and principal sum of debt, and nothing more. His interest was no more liable to be extinguished by intromissions with the rents of the subjects than a right of property was. He just got in property, but redeemably, the possession of a subject which was equivalent to his claim of debt. Accordingly, it was a settled point by the old practice that the appriser was not entitled to use any personal diligence against his debtor, unless he threw up his apprising. It was also a settled point that the appriser, by being infeft, became the vassal, and that the feudal casualties fell in his person, and not in that of the reverser; and last of all, the reverser's right entirely fell by not making redemption within the proper time. This was the original character of the old practice; but a considerable alteration was made on it by the Act 1621, c. 5, which instituted an accounting for rents, and ordered these so far as they went to be set off towards extinction of the interest, and the surplus, if any, to be applied in extinction of the principal claim of debt. Adjudication then was no longer a right of property—for how could this be extinguished by intromissions?—but a mere *pignus pratorium*, or judicial security for payment of debt. This was made still farther clear by the Act 1661, c. 62, and the finishing stroke was given by the statute 1672 in allowing the general adjudications. Accordingly, in the course of the 17th century, the language of lawyers began to alter. Stair most distinctly mentions adjudication as a *pignus pratorium*; and Dirleton submits it as doubtful whether the casualty of wardship could fall in the person of the appriser. The decisions of the Court also departed more and more from the ancient notion of adjudication bestowing a right of property. For instance, it is now settled that compensation may be pleaded against a debt secured by adjudication equally as against any other debt (observe this was impossible on the supposition that the creditor had accepted the adjudication as a right of property coming in place of the debt itself); also that personal diligence by horning and caption is competent notwithstanding the adjudication; *Macbans v. Ormiston*, July 25, 1740, M. 219, Elch. 'Adjudication,' 27."

utors can claim no more than the bygone rents of the lands not levied by the appriser himself, in case he has been in the possession.<sup>(i)</sup> Yet this right of property does not constitute the appriser vassal in the lands appraised during the legal, though he should be both infeft and in possession. The reverser continues vassal in the judgment of law as long as the right of reversion is competent to him; because so long it is in his power, by payment, to extinguish the apprising, as if it had never been led; and consequently the casualties of superiority fall, during the legal, by the death not of the appriser, but of the reverser; *Creditors of Bonhard*, July 24, 1739, M. 16,453.

The appriser is not truly vassal during the legal.

10. Apprising, being a legal diligence, renders the subject to be appraised litigious from the denunciation; the effect of which is that no voluntary deed granted thereafter by the debtor, though before the decree, can hurt the appriser; *Menzies' Crs.*, 1682, M. 8376.<sup>(k)</sup> But a creditor who neglects the completing of any begun diligence, after a reasonable time,<sup>(l)</sup> is considered as having relinquished it; so that the debtor may, after such dereliction, grant even voluntary deeds which law will support; *Johnston v. Johnston*, July 23, 1604, M. 2738.

Effect of denunciation.

(16, 17)

11. Apprisings may be either reduced upon nullities, or

Reductions of apprisings.

(35)

(i) Although an adjudication must now be held to be merely a *pignus pratorium*, and not a sale under reversion, the rule as to interest established by *Ramsay v. Brownlie*, being confirmed by later decisions (*Baillie v. Sinclair*, 1786, M. 5545; *Ryder v. Crs. of Ross*, 1794, M. 5549), may probably be held as fixed in practice; see Bell's Com. ii. 9; *Cochrane v. Bogle*, March 2, 1849, 11 D. 909 (per L. Moncreiff).

(k) No adjudication renders litigious the lands to which it relates except from and after the registration in the Register of Adjudications of a notice thereof setting forth the names and designations of the pursuer and defender, and the date of signeting; 31 & 32 Vict. c. 101, § 169; and *sup.*, note to § 2.

(l) It has been said that the giving of a charge to the superior is sufficient to preserve to the appriser the benefit of litigiosity till the expiry of the legal; Bell's Com. ii. 154. But the facilities for obtaining infeftment under recent statutes may perhaps cause the adjudger to be regarded with less favour.

redeemed within the legal.(n) They are reduced *in totum* where the defect is gross; as where they are led on a debt not truly due, or where the appriser has neglected any of the necessary solemnities. If the informality be not so essential, the Court of Session, without overturning the apprising *funditus*, sustain it *ex æquitate*, simply as a security for the principal sum and interest (*Irvine v. Irvine*, Jan. 31, 1679, M. 98); and sometimes also for the accumulations, where the question is not with co-creditors, but with the debtor himself; *Balfour v. Wilkieson*, Nov. 3, 1738, M. 107, Elch., "Adjud." 18. But the legal of apprisings so restricted can never expire against the debtor.(o)

Redemption of  
apprisings.

(30, 37, 38)

12. An apprising may be redeemed, not only by the debtor, but by any posterior appriser whose diligence is excluded by the first. He who has this right may either use an order of exemption, as in wadsets (ii. 8, § 6), or if the appriser has been in possession, he may bring an action of count and reckoning against him for his intromissions. If the appriser's intromissions within the legal amount to his debt, interest, and expenses of diligence, including the composition paid to the superior for his entry and interest thereof, the apprising is, by 1621, c. 6, declared to expire *ipso facto*; but in this case singular successors are not secure; for, as

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(n) Even after the legal (which in ordinary adjudications is ten years) has expired, the right of redemption remains until decree of declarator of expiry of the legal, or until the adjudger has possessed the lands for forty years after expiration of the legal on a completed feudal title; *Campbell v. Scotland*, 1794, M. 321; *Ormiston v. Hill*, Nov. 7, 1809, F.C.

(o) Questions of this kind have generally occurred where there has been an overcharge or *pluris petitio* in the summons. The decisions have not been uniform; but it seems "settled that, in cases of material *pluris petitio* or culpable neglect, the adjudication is annulled; but where it is slighter, the only effect is to reduce the adjudication to a security for principal and interest, without expenses or penalties;" Bell's Com. i. 745. Where *primâ facie* grounds of debt are produced, and defences are stated which cannot be instantly verified, decree may be pronounced reserving objections *contra executionem*; but such an adjudication is in security only; *ib.*; *McNeil's Crs. v. Sadler*, 1794, M. 122. An adjudication led in payment of a future or contingent debt cannot be restricted to an adjudication in security; *D. Queensberry's Exrs. v. Tail*, July 11, 1817, F.C.

intromission consists in fact, it can enter into no record by which it may be known: and even where an apprising is extinguished by payment made by the debtor himself, the appriser's discharge is good against his singular successors, without being registered in the Register of Reversions; *Lord Fraser v. Fraser*, July 23, 1662, M. 938. After redemption, the debtor is under no necessity to renew his seisin; for, upon the extinction of the right of apprising his former seisin revives.

Appraisings may be extinguished by discharges unregistered.

13. Appraisings were by the former practice preferable, according to the dates of the seisins following upon them, where the debtor himself was infest; and where the right was not perfected by seisin in the debtor's person, or did not require seisin, the preference was governed by the dates of the appraisings. And even where the first apprising required seisin to complete it, all the posterior appraisings were preferred by their dates; because the first apprising having divested the debtor of the property, there remained no right to be affected by posterior apprisers, but a reversion, which, like other personal rights, was carried without seisin; see *Stair*, iii. 2, 17; *Boyd v. Malloch*, July 22, 1675, M. 250. But by 1661, c. 62, a *pari passu* preference is established among all appraisings led within year and day of that one which has been first made effectual, either by seisin (*p*) or by exact diligence for obtaining seisin. In lands holden of the Crown, the presenting a signature in Exchequer by the appriser makes his apprising effectual; (*q*) in lands holden of a subject-superior, a charge against that superior to enter the appriser is sufficient. (*r*) And in both cases the year and day

Preference among apprisers.

(17, 23, 28)

The *pari passu* preference of appraisings.

(30, 31, 33)

What constitutes the first effectual apprising.

(*p*) See above, § 6, note.

(*q*) The lodging of a draft of a proposed Crown-writ in the office of the Presenter of Signatures (Sheriff of Chancery, see *supra*, § 39, note), with a note in a statutory form, is now "in competition of diligence and all other cases equivalent to the presenting of a signature in Exchequer; and recording of such note, and an abstract of such draft in the Register of Abbreviates of Adjudications is equivalent to recording an abstract of such signature;" 31 & 32 Vict. c. 101, §§ 64, 89.

(*r*) Now unnecessary. The adjudger completes his title by recording either the abbreviate of adjudication or the decree (31 & 32 Vict. c. 101,

runs from the date of the first apprising, and not from the date of the seisin or diligence whereby it is made effectual; *L. Balfour v. Douglas*, July 4, 1671, M. 238. In apprisings of personal rights, which admit of no diligence to make them effectual, the first in date is the first effectual apprising; and consequently all within year and day of that first are preferred *pari passu*; *Jackson v. Drummond*, Nov. 19, 1734, M. 281. The preference of apprisings after the year falls not within this statute, and therefore is governed by the former law, which preferred all apprisings after the first by their dates.(s) The co-appriser who claimed the benefit of the first appriser's diligence must refund to him, not a proportion only, but the whole of the expense disbursed by him in deducing the apprising and leading the diligence necessary for making it effectual; *Græme v. Ross*, Feb. 5, 1663, M. 245.

Expense of leading the apprising, on whom it falls.

Seisin on the first apprising is a common right to the co-apprisers.

(33)

Charge against the superior has no effect against third parties.

(31)

14. The statute declares that all the apprisers within year and day shall be preferred *pari passu*, as if one apprising had been led for the debts contained in all of them; which makes the seisin or diligence on the first apprising a common right to all the co-apprisers within year and day; and consequently though the first apprising should be redeemed, the diligence upon it still subsists as to the rest; *Straiton v. Bell*, Nov. 7, 1679, M. 255.(t) The effect given

§ 129); and, this being done, his entry with the superior is implied (Conveyancing Act, 1874, § 4, subsec. 2). Sequestration is now equivalent to a decree of adjudication by 19 & 20 Vict. c. 79, § 107.

(s) The court held such an adjudication without sasine effectual to carry the debtor's right of reversion, which was then considered to be a mere personal right, the adjudication being regarded as a sale under reversion; *Monro v. Mackenzie*, 1756, M. 256, 5 B. S. 310. Now that an adjudication is held to be a *pignus prætorium*, this decision (of which Lord Kilkerran disapproves) would probably not be followed; *Bell's Com. i. 727*; *Ross's Leading Cases, i. 149*.

(t) The bankrupt statutes have instituted a new kind of *pari passu* preference of adjudications, whereby, to save expense, posterior adjudgers may be conjoined in the decree to be pronounced in the first effectual adjudication. In order to give full effect to the equalising law, provision was made at the same time for intimation of the first process in the minute-book, and on the walls of the Court; see 19 & 20 Vict. c. 91, § 5.

to the presenting of a signature, or to a charge against the superior, is confined to the preference of apprisers among themselves, and does not alter the nature of feudal rights in competition with third parties: a charge, therefore, upon an apprising is not equivalent to a seisin, in a question with an infestment of annualrent (*Stirling v. Annualrenters of Ballagan*, 1724, M. 2831, 14,310); (u) or with the legal right of terce; *Carlyle v. Crs. of Easter Ogle*, 1724, M. 147, 15,851. The same statute prorogates the legal reversion of apprisings from seven to ten years; it saves the former preference due to apprisings that are led on *debita fundi* (ii. 8, § 18); and it gives a right to posterior apprisers to redeem all apprisings purchased by the apparent heir of the debtor, for the sums truly paid for them, at any time within ten years after the purchases: but voluntary acquisitions by apparent heirs, of rights affecting the estate of their ancestors, infer by our present law a passive title, 1695, c. 24.

Legal reversion is now prorogated to ten years.

(34)

15. The Parliament 1672, c. 19, has, in place of the old Adjudication substituted in place of apprisings.

(u) Hence, when an infestment on a voluntary right intervenes between the first effectual and a second adjudication, the intervening security is not brought into the *pari passu* preference, but ranks after the first, and before the second adjudication, "the first adjudger communicating, however, to the second such part of the sum for which he is ranked as he would have been cut out of if no voluntary right had been in the field;" *Binning v. Crs. of Auchinbreck*, 1747, M. 8389; *Chalmers v. Cunningham*, 1737, Elch. "Compet." 4. Lord Monboddo thus explains the rule:—"The Lord President objected that, unless the two adjudications were led for the same debt, the ranking of these three creditors would be inexplicable; for the first adjudger would be preferable to the annualrenter; he again to the second adjudger; and yet this second adjudger would come in *pari passu* with the first, and so be preferred to the annualrenter, which makes an inextricable circle. But the solution of this difficulty, as the practice now is established in rankings, is as follows: Suppose, as Lord Stair does, that the subject to be divided is six, and each of the debts four, the first adjudger is ranked first, and takes four; then the annualrenter, to whom there remain two. But, says the second adjudger to the first, as it is not reasonable you should lose by this annual rent that is preferable to me, so neither ought you to profit by it; if it had not existed you would have drawn but three, therefore let me have the one that you have above that number; so you neither profit nor lose by the annualrenter, nor he by me, because he draws as much as he would have done if I had been out of the case."

(39)

Special  
adjudication.

form of apprisings by messengers, directed adjudications to proceed against debtors by way of action before the Court of Session. By that statute such part only of the debtor's lands is to be adjudged as is equivalent to the principal sum and interest of the debt, with the composition due to the superior, and expenses of infestment, and a fifth part more, in respect the creditor is obliged to take land for his money, but without penalties or sheriff fees. The debtor must deliver to the creditor a valid right of the lands to be adjudged or transumps thereof, renounce the possession in his favour, and ratify the decree of adjudication. And law considers the rent of the lands as precisely commensurated to the interest of the debt; so that the adjudger lies under no obligation to account for the surplus rents. In this, which is called a special adjudication, the legal is declared to be five years; and the creditor attaining possession upon it can use no further execution against the debtor unless the lands be evicted from him.

General  
adjudication.

(40)

16. Where the debtor does not produce a sufficient right to the lands, or is not willing to renounce the possession, and ratify the decree (which is the case that has most frequently happened), the statute makes it lawful for the creditor to adjudge all right belonging to the debtor, in the same manner, and under the same reversion of ten years, as he could by the former laws have apprised it. In this last kind, which is called a general adjudication, the creditor must limit his claim to the principal sum, interest, and penalty, without demanding a fifth part more; see Act S., Feb. 26, 1684. But no general adjudication can be insisted on without libelling in the summons the other alternative of a special adjudication; (v) for special adjudications are introduced by the statute in the place of apprisings; and it is only where the debtor refuses to comply with the terms thereof that the creditor can lead a general adjudication.

Abbreviate of  
adjudications.

(43)

17. By regulations 1695, c. 24, abbreviates are ordained to be made of all adjudications after the manner of the former

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(v) The Lands Transference Acts of 1847 made this unnecessary, and this provision was re-enacted by 31 & 32 Vict. c. 101, § 59.

allowances, which are to be signed by the Lord Ordinary who pronounced the decree, and thereafter given to the clerk of the bills, to be recorded within sixty days after the date of the decree.<sup>(x)</sup> In every other respect, general adjudications have the same nature and effect that apprisings had. Adjudgers in possession are accountable for the surplus rents; a citation in adjudications renders the subject litigious;<sup>(y)</sup> superiors are obliged to enter adjudgers; the legal of adjudications does not expire during the debtor's minority, &c. Only it may be observed, that though apprisings could not proceed before the term of payment, yet where the debtor is *vergens ad inopiam*, the court, *ex nobili officio*, admit adjudication for the debt before it be payable; *Blaw v. Blaw*, July 12, 1711, M. 12,908, 8149. But this sort, being founded solely in equity, subsists merely as a security, and cannot carry the property to the creditor by any length of time; *ibid.*<sup>(z)</sup>

General adjudications of the same nature with apprisings.

(41, 42)

Adjudications in security.

18. There are two kinds of adjudication which took place at the same time with apprising, and still obtain—viz., adjudications on a decree *cognitionis causæ*, otherwise called *contra hæreditatem jacentem*, and adjudications *in implement*. Where the debtor's apparent heir, who is charged to enter, formally renounces the succession, the creditor may obtain a decree *cognitionis causæ*, in which, though the heir renouncing is cited for the sake of form, no sentence condemnatory can be pronounced against him in respect of his renunciation; the only effect of it is to subject the *hæreditas jacens* to the creditor's diligence. By the old practice, if the debt was liquid, the creditor might, in the process of cognition, protest for adjudication, which was allowed to him summarily, without the necessity of a separate action (*Stair*, iii. 2, § 45); but

Adjudication contra hæreditatem jacentem;

(47)

(x) The abbreviate is now signed by the Extractor (1 & 2 Geo. IV. c. 38, § 18), and recorded by the keeper of the Register of Hornings, Inhibitions, and Adjudications (1 & 2 Vict. c. 118, § 14), which is now united with the Register of Sasines (31 & 32 Vict. c. 64, § 17).

(y) See above, § 10, note (k).

(z) "But it confers the (statutory) right of ranking on the estate; entitlements to payment of a dividend on bankruptcy; or to consignment of the dividend if the debt be contingent;" *Bell's Pr.* 832.

now adjudication cannot pass without a summons for that purpose.(a)

what is carried  
by it;

(48, 49)

redemption  
thereof.

19. Adjudications *contra hæreditatem jacentem* carry not only the lands themselves that belonged to the deceased, but the rents thereof fallen due since his death; for these, as an accessory to the estate belonging to the deceased, would have descended to the heir if he had entered (*Corsar v. Durie*, Dec. 19, 1638, M. 44); which rule is applied to all apprisings or adjudications led on a special charge, by *L. Kilbucko v. Poldeans* (*Dooly v. Dickson*), Feb. 13, 1740, M. 228, 5 B. S. 216, 695. This sort of adjudication is declared by 1621, c. 7, redeemable within seven years (which was then the legal of apprisings), by any co-adjudging creditor either of the deceased debtor, or of the heir renouncing. The heir himself who renounces cannot be restored against his renunciation, nor consequently redeem if he be not a minor; *Macaulay v. Couston, &c.*, Jan. 27, 1680, M. 45.(b) But even a major may redeem indirectly, by granting a simulate bond to a confident person, the adjudication upon which, when conveyed to himself, is a good title to redeem all other ad-

(a) It is now unnecessary, in proceedings to attach heritable estate for an ancestor's debt, to raise separate actions of constitution and adjudication; but they may, whether the heir renounces or not, be combined in one summons, citation and execution being equivalent to a general charge where the heir renounces, and to a general charge and a special charge where the heir does not renounce and the ancestor is infest, or to a general charge and a general special charge where the heir does not renounce and the ancestor is not infest. The expiry of the *inducia* in these summonses has the same effect as the expiry of the *inducia* of such charges respectively, as the case may be. The procedure in the combined actions is the same as formerly, and decree of constitution and adjudication may be pronounced in the same interlocutor; 31 & 32 Vict. c. 101, § 60. By § 61 the heir's *annus deliberandi* is reduced to six months. By § 159 of the same Act the lands to be adjudicated do not become litigious until notice of the summons has been registered.

(b) It would seem that the contrary is ruled by *Stewart v. Lindsay*, Dec. 7, 1809, F.C.; and that an adjudication *contra h.j.* is subject to redemption before declarator of expiry of the legal like any other adjudication, even when it proceeds on the renunciation of the heir. At least it is redeemable by a subsequent heir taking up the succession. But see Bell's Com. i. 714.

judications against the lands belonging to his ancestor. The superior of the lands thus adjudged is laid under the same obligation to enter the adjudger as in the case of apprisings, by 1669, c. 18.(c) (52)

20. Adjudications *in implement* are deduced against those who have granted deeds without procuratory of resignation or precept of seisin, and refuse to divest themselves; to the end that the subject conveyed may be effectually vested in the grantee. These adjudications may be also directed against the heir of the granter; in which case Visc. Stair asserts that a charge to enter is unnecessary (iii. 2, § 52); but his Lordship's opinion is not supported by practice. Here there is no place for a legal reversion; for, as the adjudication is led for completing the right of a special subject, it must carry that subject as irredeemably as if the right had been voluntarily completed. And for the same reason, it being to supply the defect of a special deed, no other adjudication, though within year and day, can come in *pari passu* with it; Stair, *ibid.*(d) Adjudication in implement. (50, 51)

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(c) See *Alexander v. Steele*, June 25, 1841, 3 D. 1098.

(d) *Campbell v. Macvicar*, 1752, M. 277, 1 Ross L. C., 121; *Wood v. Scott*, Feb. 5, 1833, 11 S. 355. An adjudication in implement could proceed notwithstanding the dependence of a process of judicial sale; *Wood v. Scott*, cit., *Bontine v. Graham*, March 5, 1839, 1 D. 631; see 1 D. 906; but the Bankruptcy Acts 2 & 3 Vict. c. 41, and 19 & 20 Vict. c. 91 and 102, make the act and warrant of confirmation in favour of the trustee in a sequestration equivalent to a decree of adjudication in implement, as well as for payment; *Laurie v. Laurie*, March 10, 1854, 16 D. 860. Analogous to this adjudication in implement is the declaratory adjudication, the uses of which are thus described by Bell, Com. i. 751 :—"Where a person has granted a security over his estate by means of an absolute disposition, trusting to the honour of the disponee; or where a company has purchased property which, in compliance with feudal rules, is disposed to one of the partners or a third person, for behoof of the partnership, but without including the declaration of trust in the disposition, the creditors of the apparent proprietor, if there were no remedy, might by adjudication, judicial sale, or sequestration, carry off this as a fund of division among them, leaving the party to whom the right truly belongs as a mere creditor personally for the value. The remedy in such a case is by an action wherein a solemn judicial declaration can be made of the pursuer's right. This action is brought into the Court of Session by a summons stating the Declaratory adjudication.

Adjudications  
*contra hereditatem jacentem*  
may be pursued before the Sheriff;

(53, 54)

they must  
have abbreviates.

21. Adjudications *contra hereditatem jacentem* might have been before the Act 1672, and consequently may at this day, be carried on before the sheriff; for that Act, which gives to the Court of Session the exclusive jurisdiction in adjudications, can be understood only of those which are thereby introduced in place of apprisings; *Ker v. Primrose*, Jan. 4, 1709, M. 46. It is probable that the practice prior to the Act 1672 was the same with regard to adjudications in implement, as the cognisance of these imported no higher jurisdiction than that of other adjudications; and upon that practice the question depends, whether they may now be brought before the sheriff, for they are not comprehended under the statute. The regulations 1695, art. 24, had ordained abbreviates of adjudications to be signed by the Lord Pronouncer, in place of the former allowances. And though there were no allowances of adjudications on decrees *cognitionis causæ*, yet by additional regulations, 1696, art. 3, abbreviates of these were also directed to be signed. Since that time it has been the general practice, where such adjudications were led before the sheriff, to get abbreviates signed by him; and where they have no abbreviates, the Court of Session refuses to grant letters of horning on them against superiors; Act S., Dec. 2, 1742.(e)

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circumstances, and concluding that it should be found and declared that the property truly belongs to the pursuer. This is a real action, in which the object is not to obtain a decree against the defender as for a debt, but a judgment against the land or other property. And after the commencement of it, no voluntary act of the apparent proprietor is suffered to interfere with or defeat the right to be declared. This action may also admit of a conclusion of adjudication for having the land declared and adjudged to belong to the pursuer, and the superior decerned and ordained to receive the pursuer as vassal, and grant to him a charter on which he may be infeft. The effect of such a decree, followed by infeftment on the lands, will be to vest in the pursuer a right, which, like that of an adjudication in implement, will not be subject to the *pari passu* preference." See further, *per* Lord Curriehill, in *Miles v. North British Ry. Co.*, Feb. 16, 1867, 5 Macph. 402, 409. The objects of this action may now be attained more simply by presenting a petition to the Court under "The Trusts (Scotland) Act, 1867 (30 & 31 Vict. c. 97) § 14." See also 31 & 32 Vict. § 24.

(e) This process is hardly ever brought before the sheriff, and its use

22. Before treating of judicial sales of bankrupt estates, (55, 56) the nature of sequestration may be shortly explained, which is a diligence that generally ushers in actions of sale. Sequestration of lands is a judicial act of the Court of Session, whereby the management of an estate is put into the hands of a factor or steward named by the Court, who gives security, and is to be accountable for the rents to all having interest. This diligence is competent, either where the right of the lands is doubtful, if it be applied for before either of the competitors has attained possession; or where the estate is heavily charged with debts: but as it is an unfavourable diligence, it is not admitted, unless that measure shall appear necessary for the security of creditors. (g) Subjects not brought before the Court by the diligence of creditors cannot fall under sequestration; for it is the competition of creditors which alone founds the jurisdiction of the Court to take the disputed subject into their possession. Hence a creditor whose debt is not made real on the lands in question has no title to demand it; (h) and the arrestment of rents from year to year can only affect a sequestration of the rents arrested, but not of the lands themselves; *Creditors of Ochtertyre*, Feb. 13, 1745, M. 14,345. Sequestration of land estates;  
when competent.  
What subjects fall under sequestration.

23. The Court of Session, who decree the sequestration, has the nomination of the factor, in which they are directed by the recommendation of the creditors. Writers were, by Act S., Nov. 23, 1710, declared incapable of this office; and Factors on sequestrated estates;  
(57)

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is still less expedient since the changes introduced by recent conveyancing Acts, which are all adapted to the practice of the Supreme Court.

(g) Nor will the Court act on mere allegations; *Campbell v. Campbell* (Breadalbane case), June 27, 1863, 1 Macph. 991, aff. June 27, 1864, 2 Macph. H.L. 41; *Monro v. Graham*, June 28, 1849, 11 D. 1202. Infetment is regarded as equivalent to possession in heritage, even where it is only in security; but a personal deed denuding a deceased owner has been held sufficient to sustain a sequestration against an apparent heir claiming to continue the possession of his ancestor; *Hawarden v. Dunlop*, May 31, 1861, 23 D. 923; see 24 D. 1267; *Hyndford v. Dickson*, 1769, M. 14,347. See *Thoms v. Thoms*, March 27, 1865, 3 Macph. 776.

(h) "Perhaps a different rule would be followed now that the process of judicial sale has become a general adjudication for all the creditors producing interests;" Bell's Com. ii. 263.

their duty.  
(58)

Salary of  
factors.

though an objection be seldom made on that Act, yet when it is offered the Court sustains it.(i) The debtor's apparent heir may be also accounted an improper factor, as the same grounds of suspicion that lie against the debtor himself commonly strike with equal force against his heir, both in point of necessitous circumstances and of design against the creditors; but where no opposition is made, nothing hinders him from being named. A factor appointed by the Session, though the proprietor had not been infeft in the lands, has a power to remove tenants (*Thomson v. Elderson*, 1757, M. 4070), contrary to the general rule stated (ii. 6, § 23). The rules by which a judicial factor must conduct himself, are contained in several Acts of Sederunt. By Act S., Nov. 22, 1711, § 6, 7, 8, factors must, within six months after extracting their factory, make up a rental of the estate, and a list of the arrears due by tenants, to be put into the hands of the clerk of the process, as a charge against themselves, and a note of such alterations in the rental as may afterwards happen; and must also deliver to the clerk annually a scheme of their accounts, charge and discharge, under heavy penalties. They are, by the nature of their office, bound to the same degree of diligence that a prudent man adhibits in his own affairs; and by Act S., July 31, 1690, they are accountable for the interest of the rents which they either have, or by diligence might have recovered, from a year after their falling due. As it is much in the power of these factors to take advantage of the necessities of creditors by purchasing their debts at an undervalue, all such purchases, made either by the factor himself, or for his behoof, are declared equivalent to an acquittance or extinction of the debt by Act S., Dec. 25, 1708. No factor can warrantably pay to any creditor without an order of the Court of Session; for he is, by the tenor of his commission, directed to pay the rents to those who shall be found to have best right to them. Judicial factors are entitled to a salary, which is generally stated at five per cent. of their intronissions; but it is seldom ascertained till their office expires, or till their accounting, that the Court may modify a

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(i) This act of sederunt has gone into disuse.

greater or smaller salary, or none in proportion to the factor's integrity and diligence; *Heriot v. Ker*, June 22, 1711, M. 4061; see also Act S., Nov. 23, 1711. Many cases occur where the Court of Session, without sequestration, name a factor to preserve the rents from perishing, *e.g.*, where an heir is deliberating whether to enter; where a minor is without tutors; where a succession opens to a person residing abroad, &c. (Stair, iv. 50, § 28); in all which cases the factor is subjected to the rules laid down in Act S., Feb. 13, 1730.(j)

Factors  
without  
sequestration.

24. The word *bankrupt* is in our law sometimes applied to persons whose funds are not sufficient for their debts; and sometimes not to the debtor but to his estate. There was no method known in our law for the proper sale of a bankrupt estate, so as the price might be divided among the creditors, till 1681, c. 17; by which the Court of Session was empowered, at the suit of any real creditor,(k) to try the value of the debtor's estate, and name commissioners to sell it for the payment of his debts; but as the commissioners named by the Session, in pursuance of this Act, were generally backward to undertake so ungrateful an office, and as the consent of the debtor, which the statute required where his right of reversion was not expired, could seldom be obtained, it was enacted by 1690, c. 20, that decrees of sale of bankrupt estates should be pronounced by the Court itself, and that such sales might proceed in all cases without the consent of the debtor.

Sale of bankrupt estates.

(59)

25. No process of sale at the suit of a creditor can proceed without a proof of the debtor's bankruptcy by said Act 1690 (Act S., Feb. 24, 1692), or at least, as Lord Stair softens it (iv. 51, 6), unless his lands be so charged with debts that prudent persons will not buy from him; and therefore the summons of sale must comprehend the debtor's whole estate.(l)

(60, 62)

(j) Now to the rules laid down in the Pupils Protection Act (12 & 13 Vict. c. 51).

(k) Who must be in possession of the debtor's estate, or part of it, either actually or by a decree of maills and duties, or by sequestration of the rents; Bell's Com. ii. 258.

(l) It is sufficient to authorise a sale that the interest of the debts and

Ranking of  
creditors.

The debtor, or his apparent heir, and all the real creditors in possession, must be made parties to the suit; but it is sufficient if the other creditors be called by an edictal citation; Act S., Nov. 23, 1711, § 1.(m) The summons of sale contains a conclusion of ranking or preference of the bankrupt's creditors. In this ranking, first and second terms are assigned to the whole creditors for exhibiting in Court (or producing) their rights and diligences, which must be published in the *Edinburgh Evening Courant*, according to the directions of Act S., Jan. 17, 1758;(n) and it is thereby declared that the decree of certification proceeding thereupon against the writings not produced shall have the same effect in favour of the creditors who have produced their rights as if that decree had proceeded upon an action of reduction-improbation (iv. 1, § 5). The ranking of these creditors must be concluded by an extracted decree before the actual sale, at least to the extent of the value put on the lands by the Court of Session, Reg. 1695, arg. 26.(o) The irredeemable property of the lands is adjudged by the Court to the highest offerer at the sale. The creditors receiving payment must grant to the purchaser absolute warrandice to the extent of the sums received by them (Act S., March 31, 1685); and the lands purchased are, by 1695, c. 6, declared disburdened of all debts or deeds of the bankrupt, or his ancestors, either on payment of the price by the purchaser to the creditors, according to their preferences, or on consignment of it, in case of their refusal, in the hands of the Magistrates of Edinburgh.(p) The only remedy

The security  
of judicial  
purchasers.

(63)

the other annual burdens exceed the yearly income of the subject, or that a sequestration has taken place under the Bankruptcy Act; 19 & 20 Vict. c. 91, § 3.

(m) See A. S., Nov. 13, 1793.

(n) By A. S., July 11, 1794, the notice must be given in the *Edinburgh Gazette* for three weeks.

(o) Since 1783 the sale of lands or other heritable subjects may be carried on whether the ranking is concluded or not; see 19 & 20 Vict. c. 91, § 2.

(p) The price may be consigned by the purchasers in any joint-stock bank of issue in Scotland; 19 & 20 Vict. c. 91, § 2. But it is decided, contrary to the view which was previously maintained, that a decree of sale gives no protection against the claims of third parties whose right is

provided by the Act to such creditors as judge themselves hurt by the sale or division of the price, even though they should be minors, is an action for recovering their share of the price against the creditors who have received it.

26. The expense of these processes was at first disbursed by the factor out of the rents in his hands; by which the whole burden of such expense fell upon the posterior creditors. By Act S., Nov. 23, 1711, § 9, it was proportioned among all the creditors, according to the shares that they should severally draw of the price; because actions of sale and ranking redounded to the common benefit of them all. But as this last regulation cut off the preferable creditors from their claim of expenses, which the nature of their rights or diligences entitled them to, matters were again put on the first footing, by Act S., Aug. 10, 1754.

27. Apparent heirs are entitled, by 1695, c. 24, to bring actions of sale of the estate belonging to their ancestors, whether bankrupt or not; which privilege is not lost to them though they should behave as heirs; *Blair v. Stewart*, Feb. 28, 1733, M. 5247.(q) The expense of these actions ought to fall upon the pursuer where there appears to be any excrescence of the price after payment of the creditors; because, in such case he is presumed to act for himself. But where there is no excrescence, the creditors, who alone are gainers by the sale, ought to be burdened with the expense of it.

28. As processes of ranking and sale are designed for the common interest of all the creditors, no diligence carried on or completed during their pendency ought to give any preference in the competition; *pendente lite nihil innovandum*. Hence, in a competition between a creditor who had ad-

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not derived from the bankrupt, and who are not called in the process of sale; *Urquhart v. Officers of State*, 1757, M. 9919, aff. Cr. & St. 586; Inst. l. c.; Bell's Com. ii. 278. As to the effect of the decree and the mode in which the purchaser completes his title, see Conveyancing Act 1874, § 62.

(q) Or should have renounced in an action of constitution brought against them by a creditor; *Belshier's Crs. v. His Heir-Apparent*, 1776, 5 B. S. 561, Hailes 693; *Smith v. Harris*, March 3, 1854, 16 D. 627.

judged, pending an action of sale, and another who, that he might not be excluded by the first adjudger, had led a second within year and day of the first, but after the sale,—the two adjudications were preferred *pari passu*; though the last, having been led after the right of the lands had been transferred from the debtor, was an improper diligence; *Irvine v. Maxwell*, 1748, M. 5264.(r)

The application of catholic rights in a competition.

(66)

29. It is a rule in all real diligences that where a creditor is preferable on several different subjects, he cannot use his preference arbitrarily by favouring one co-creditor more than another, but must allocate his universal or catholic debt proportionally against all the subjects or parties whom it affects. If it is material to such creditor to draw his whole payment out of any one fund, he may apply his debt so as may best secure himself; but that inequality will be rectified as to the posterior creditors, who had likewise, by their rights and diligences, affected the subjects out of which he drew his payment, by obliging him to assign in their favour his right upon the separate subjects which he did not use in the ranking: by which they may recur against these separate subjects for the shares which the debt preferred might have drawn out of them. As the obligation to assign is founded merely in equity, the catholic creditor cannot be compelled to it if his assigning shall weaken the preference of any separate debt vested in himself, affecting the special subject sought to be assigned. But if a creditor upon a special subject shall acquire from another a catholic right, or a catholic creditor shall purchase a debt affecting a special subject, with a view of creating to the special debt a higher degree of preference than was naturally due to it by an arbitrary application of the catholic debt, equity cannot protect him from assigning in favour of the creditor excluded by such application, especially if, prior to the purchase, the subject had become litigious by the process of ranking; for transmissions ought not to hurt creditors who are no parties to

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(r) All separate adjudications are prohibited during the dependence of a judicial sale; and the decree of sale draws back as a general adjudication to the date of the first calling of the process of sale; 19 & 20 Vict. c. 91, § 4; see above, § 20, note.

them, nor to give the purchaser any new right which was not formerly in himself or his cedent. This head of our law is accurately discussed in an essay on the *beneficium cedendarum actionum*.<sup>(s)</sup>

30. It is, in the last place, to be observed on this head, that although a creditor adjudging on a debt should happen to recover a part of it out of any separate funds belonging to his debtor over which his adjudication did not reach, he does not thereby diminish the security acquired to him by his adjudication, which remains to him as broad for the last shilling as for the whole debt; *E. of Loudon v. L. Ross*, Feb. 16, 1734, M. 14,114, Elch. "Ranking," 3; and *Campbell of Auchinbreck's Crs. v. Lockwood*, 1758, M. 14,129.<sup>(t)</sup>

(67)

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(s) By Lord Kames. See "Prin. of Equity," b. i. c. 3, § 1; Bell's Com. ii. 523 *et seq.*

(t) *Douglas Heron & Co. v. Bank of England*, 1781, M. 14,131.

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 BOOK III.
 

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## TIT. I.—OF OBLIGATIONS AND CONTRACTS IN GENERAL.

- (1-3) **1.** The law of heritable rights being explained, Moveable Rights fall next to be considered, the doctrine of which depends chiefly on the nature of obligations. An obligation is a legal tie, by which one is bound to pay or perform something to another. Every obligation on the person obliged implies an opposite right in the creditor, so that what is a burden in regard to the one is a right with respect to the other; and all rights founded on obligation are called personal. There is this essential difference between a real and a personal right, that a *jus in re*, whether of property or of an inferior kind, as servitude, entitles the person vested with it to possess the subject as his own, or, if he is not in possession, to demand it from the possessor; whereas the creditor in a personal right has only *jus ad rem*, or a right to compel the debtor to fulfil his obligation, without any right in the subject itself, which the debtor is bound to transfer to him. It is said in the definition, *to pay or to perform*. The first, *to pay*, relates properly to those subjects which the debtor is bound to deliver to the creditor, and is generally limited to sums of money. The other alternative, *to perform*, includes all articles consisting in fact, as an obligation to dispoise, or to procure something to be done for the creditor. One cannot oblige himself but by a present act of the will. A bare resolution, therefore, or purpose to be obliged, is alterable at pleasure; *Kincaid v. Dickson*, Feb. 27, 1673, M. 12,143.
- Obligations or personal rights.
- Difference between real and personal rights.
- Obligations are either merely natural,
- (4, 5) **2.** Obligations are either—(1) merely natural, where one person is bound to another by the law of nature, but cannot be compelled, by any civil action, to the performance. Thus, though deeds granted by a minor having curators

without their consent, are null, yet the minor is naturally obliged to perform such deeds; and parents are naturally obliged to provide their children in reasonable patrimonies. Natural obligations had, by the Roman law, most of the effects of proper ones, except the right of action; by ours they entitle the creditor to retain what he has got in virtue thereof, without being subjected to restore it (iii. 3. § 17), and a fidejussory obligation may be interposed to them (iii. 3, § 24). (2) Obligations are merely civil, which may be sued upon by an action, but are elided by an exception in equity; this is the case of obligations granted through force or fear, &c. (3) Proper or full obligations are those which are supported both by equity and the civil sanction.

3. Obligations may be also divided into—(1) Pure, to which neither day nor condition is adjoined. These may be exacted immediately (l. 41, § 1, *de verb. obl.*, 45, 1). (2) Obligations (*ex die*) which have a day adjoined to their performance. In these, *dies statim cedit, sed non venit*, a proper debt arises from the date of the obligation, because it is certain that the day will exist; but the execution is suspended till the lapse of that day. (3) Conditional obligations, in which there is no proper debt (*dies non cedit*) till the condition be purified, because it is possible the condition may never exist; and which, therefore, are said to create only the hope of a debt (§ 4, *Inst. de verb. obl.* 3, 15); but the granter even of these has no right to resile. An obligation to which a day is adjoined that possibly may never exist, implies a condition (*dies incertus pro conditione habetur*, l. 21, *pr. quando dies leg.*, 36, 2). Thus, in the case of a provision to a child payable when he attains to the age of fourteen, if the child dies before that age his provision falls; *Belches v. Belches*, Feb. 16, 1677, M. 6327.

4. Obligations, when considered with regard to their cause, were divided by the Romans into those arising from contract, quasi-contract, delict, and quasi-delict. But there are certain obligations, even full and proper ones, which cannot be derived from any of these sources, and to which Lord Stair gives the name of *obediential*. Such is, among others, the obligation of parents to aliment or maintain their

They are either pure,

(6, 7)

or conditional.

(i. 6, 56)

Obediential obligations.

Obligation of  
aliment.

children ; which arises singly from the relation of parent and child, and may be enforced by the civil magistrates (l. 5, § 10, *de agn. lib.*, 25, 10). Under parents are comprehended the mother, grandfather, and grandmother, in their proper order (D. l. 5, § 2). This obligation on parents extends to the providing of their issue in all the necessities of life, and giving them suitable education (D. l. 5, § 12). It ceases when the children can earn a livelihood by their own industry ; but the obligation on parents to maintain their indigent children, and reciprocally on children to maintain their indigent parents, is perpetual (l. ult. § 5, C. *de bon. quæ lib.*, 6, 61). This obligation is, on the father's death, transferred to the eldest son, the heir of the family ; who, as representing the father, must aliment his younger brothers and sisters ; the brothers are only entitled to alimony till their age of twenty-one, after which they are presumed able to do for themselves ; but the obligation to maintain the sisters continues till their marriage ; *Douglass v. Douglas*, Feb. 8, 1739, M. 425, Elch. "Aliment," 39. In persons of lower rank the obligation to aliment the sisters ceases after they are capable of subsisting by any service or employment.(a)

Obligations  
arising from  
the duty of  
restitution.

5. All obligations arising from the natural duty of restitution fall under this class. Thus, things given upon the view of a certain event must be restored if that event does

(10, 11)

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(a) " In the case of natural children, the obligation of the parent to aliment the child is generally held to terminate with the age of fourteen or of pupillarity, though where the child is insane, an idiot, or incapable through bodily infirmity of providing for himself, the obligation may be extended to a much longer period, and may even continue during life. How far a father is bound to aliment his son's wife or widow is still unsettled. The amount of aliment is limited to what is really necessary for the child's support ; and the Court have no power to decern against a father for such an aliment as they think suitable to his rank and position of life. The tendency of our Courts to interfere with the father's management, by awarding an additional aliment to a son, was corrected by the House of Lords in *Maule v. Maule*, June 1, 1825, 1 W. & S. 266. The duty of aliment is reciprocal,—the children being in like manner bound to aliment their parents when they become unable to support themselves ; *Mackenzie v. Mackenzie*, Dec. 2, 1864, 3 Macph. 177." —MOIR. See also above, p. 115.

not afterwards exist (*Tit. de cond. causa data*, 12, 4); e.g., what is given in contemplation of a marriage which never followed. Thus also, things given *ob turpem causam*, where the turpitude is in the receiver and not in the giver, must be restored to the owner(b) (l. 1, § 2, *de cond. ob turp. caus.*, 12, 5). And, on the same principle, one upon whose ground a house is built or repaired by another(c) is obliged, without any covenant, to restore the expense laid out upon it in so far as it has been profitable to him; *Jack v. Pollock*, Feb. 23, 1665, M. 3213.

6. A contract is the voluntary agreement of two or more persons whereby something is to be given or performed upon one part for a valuable consideration, either present or future, on the other part. Consent, which is implied in agreement, is excluded—(1) By error in the essentials of the contract (l. 15, *de jurisd.*, 2, 1; l. 9, *pr. de contr. empt.*, 18, 1); for in such case the party does not properly contract, but errs, or is deceived. And this may be also applied to contracts which take their rise from fraud or imposition. (2) Consent is excluded by such a degree of restraint upon any of the contracting parties as extorts the agreement; for where violence or threatenings are used against a person, his will has really no part in the contract.(d) Contracts were, by the Roman law, perfected either *re*, by the intervention of things; or by words; or by writing; or by sole consent. In order to perfect real contracts one of the parties must have actually given or performed something to the other. If there was barely an obligation to give or perform, it resolved into a *nudum pactum*, which was not productive of an action but, by the law of Scotland, one who obliges himself to lend or give in pledge may be compelled to performance. The real contracts of the Romans are *loan*, *commodate*, *deposition*, and *pledge*.

Obligations by contract.

(16)

Consent is implied in contracts.

17,

Real contracts.

(b) Obligations granted *ob turpem causam* cannot be enforced, but if performed no action lies for restitution; *A v. B*, May 21, 1816, F.C.

(c) The right arises only where the builder has been in *bonâ fide*; *Barbour v. Halliday*, July 3, 1840, 2 D. 1279; *supra*, ii. 1, 7.

(d) As to the nature of the consent necessary to the validity of a contract, and other general principles, see Note (A), p. 304.

*Mutuum* ;

(18)

its proper  
subjects ;

(19)

the obligations,

and action,  
arising from it.

Commodate.

(20)

7. Loan or *mutuum* is that contract which obliges a person who has borrowed any fungible subject from another, to restore to him as much of the same kind, and of equal goodness. Whatever receives its estimation in number, weight, or measure is a fungible, as corn, wine, current coin, &c. The only proper subjects of this contract are things which cannot be used without either their extinction or alienation ; hence the property of the thing lent is necessarily transferred by delivery to the borrower, who, consequently, must run all the hazards either of its deterioration or its perishing, according to the rule, *Res perit suo domino*. Where the borrower neglects to restore at the time and place agreed on, the estimation of the thing lent must be made according to its price at that time and in that place ; because it would have been worth so much to the lender if the obligation had been duly performed. If there is no place nor time stipulated, the value is to be stated according to the price that the commodity gave when and where it was demanded. In the loan of money, the value put on it by public authority, and not its intrinsic worth, is to be considered.<sup>(e)</sup> This contract is obligatory only on one part ; for the lender is subjected to no obligation. The only action, therefore, that it produces is pointed against the borrower, that he may restore as much in quantity and quality as he borrowed, together with the damage the lender may have suffered through default of due performance.

8. Commodate is a species of loan, gratuitous on the part of the lender, where the thing lent may be used without either its perishing or its alienation. Hence, in this sort of loan the property continues with the lender ; the only right the borrower acquires in the subject is its use, after which he must restore the individual thing that he borrowed. Con-

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(e) This sentence, which is omitted in the Inst., had reference to the usury laws, now abolished by 17 & 18 Vict. c. 90. But in the absence of stipulation or of special circumstances, 5 per cent. is still "legal interest ;" *Smith v. Barlas*, Jan. 15, 1857, 19 D. 267 ; *Wauchope v. N. B. Ry. Co.*, Dec. 17, 1863, 2 Macph. 326 ; *Douglas v. Douglas' Trs.*, June 7, 1867, 5 Macph. 827. But see *Gordon v. Howden*, 15 D. 378.

sequently, if the subject perishes, it perishes to the lender unless it has perished by the borrower's fault.

What degree of fault or negligence makes either of the contracting parties liable to the other in damages is comprehended under the following rules. Where the contract gives a mutual benefit to both parties, each contractor is bound to exhibit a middle sort of diligence such as a man of ordinary prudence uses in his affairs, the neglect of which is called *culpa levis*, *culpa levis*. When only one of the parties has benefit by the contract, that party must use exact diligence, the opposite of which is *culpa levissima*; and the other, who has no advantage by it, is accountable only *de dolo vel culpa lata*, *levissima*, for dole (l. 5, § 2, *com.*, 13, 6), or for gross omissions which the law construes to be dole (l. 226, *de verb. sign.*, 50, 16). Where one employs less care on the subject of any contract which implies an exuberant trust, than he is known to employ in his own affairs, it is considered as dole (l. 32, *depos.*, 16, 3).<sup>(g)</sup>

What degrees of diligence are required in contracts.

(21)

9. By these rules the borrower in the contract of com-

Obligations arising from commodate.

(g) Hasse (*Die Culpa des Römischen Rechts*, Kiel, 1815) and other continental civilians have shown that there is no sufficient authority in the Roman jurists for so minute a definition of the different degrees of *culpa* in the law of reparation for injuries; and that even in the law of contracts there is no room for the prestation of *levissima culpa*, i.e., for a third degree of diligence greater than that of a respectable and intelligent man in his own affairs; see Lord Mackenzie's *Studies in Roman Law*, p. 197 (5th ed. 207) *et seq.* In England and Scotland, in consequence of the practice of referring to a jury the decision of the question, whether in each case the defendant used the skill and care appropriate to the circumstances, even the distinction between ordinary negligence and "gross" negligence has in recent times been somewhat discredited. Lord Cranworth said that gross negligence is negligence with a vituperative epithet; *Wilson v. Brett*, 11 M. & W. 113; *Grill v. General Screw Collier Co.*, 35 L. J. C. P. 321, 37 L. J. C. P. 205; *Mackintosh v. Mackintosh*, July 15, 1864, 2 Macph. 1357. But certainly less care is required in some cases than in others. "Though degrees of care are not definable, they are with some approach to certainty distinguishable; and where the evidence is left to the jury, they must be led by a cautious and discriminating direction to distinguish as far as they can degrees of things which run more or less into each other."—*Per* L. Chelmsford in *Giblin v. M'Mullen*, 38 L. J., P. C. 25.

(22-26)

modate must be exactly careful of the thing lent, and restore it at the time fixed by the contract, or after that use is made of it for which it was lent. If he puts it to any other use, or neglects to restore it at the time covenanted, and if the thing perishes thereafter, even by mere accident, he is bound to pay the value. On the other part, the lender is obliged to restore to the borrower such of the expenses disbursed by him on the subject as arose from any uncommon accident, but not those that naturally attend the use of it (l. 18, § 2, *commod.*, 13, 6). The essential obligations consequent on

The direct and  
contrary  
actions of  
commodate.

this contract lie upon the borrower. The action, therefore, competent to the lender against him for fulfilling his part is called the direct action of commodate; and that which is competent to the borrower upon the counterpart of the contract is called the contrary action. Where a thing is lent gratuitously, without specifying any time of redelivery, it constitutes the contract of *precarium*, which is revocable at the lender's pleasure, and, being entered into from a personal regard to the borrower, ceases by his death; l. 12, § 1, *de prec.*, 43, 26.

*Precarium.*

Deposition ;  
(26, 27)

the obligations  
arising from it.

10. Deposition is a contract by which one who has the custody of a thing committed to him (the depositary), is obliged to restore it to the depositor. If a reward is bargained for by the depositary for his care, it resolves into the contract of location. As this contract is gratuitous, the depositary is only answerable for the consequences of gross neglect; but after the deposit is redemanded, he is accountable even for casual misfortunes. He is entitled to a full indemnification for the losses he has sustained by the contract, and to the recovery of all sums expended by him on the subject. But he had no right, by the civil law, to retain the subject itself for his reimbursement; the exuberant trust which was implied in the contract excluded all right, both of compensation and retention; l. 11, C. *depos.*, 4, 34.(h)

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(h) The deposit of money with a banker is sometimes called "improper deposit;" Bell's Pr. 210. It is properly a loan; the property is transferred, and the depositor is a mere creditor.

11. By an edict of the Roman prætor, which is with *Nauta, cauponæ, stabularii.* some variations adopted into our law, an obligation arises without formal paction, barely by a traveller's entering into an inn, ship, or stable, and there depositing his goods or putting up his horses, whereby the innkeeper, shipmaster, or stabler is accountable, not only for his own facts and those of his servants (which is an obligation implied in the very exercise of these employments), but for those of the other guests or passengers;<sup>(i)</sup> and indeed in every case, unless where the goods have been lost *damno fatali*, or carried off by pirates or housebreakers.<sup>(k)</sup> This edict, so contrary to

(28, 29)

(i) *Williamson v. White*, June 21, 1810, F.C.; *M'Pherson v. Christie*, May 26, 1841, 3 D. 930. "By 26 & 27 Vict. c. 41, § 1, an innkeeper henceforth shall not incur a greater liability than £30 for any kind of traveller's property, not being a horse or carriage, except where the injury has arisen from the wilful act or neglect of the innkeeper or his servants. But by § 3 the innkeeper, in order to get the benefit of this limitation of liability, must print and conspicuously display in the hall or entry to his inn the terms of the Act."—MOIR.

(k) It has never been doubted that theft is no defence against the edict. According to Mr. Bell, Pr. 238, neither is robbery. But *Walling v. M'Donald*, June 10, 1825, 4 S. 83, supports the text. "It was doubtful whether accidental fire was to be considered an unavoidable accident. Apparently it was not so according to the law of England, nor that of Rome. But 19 & 20 Vict. c. 60, § 17, enacts that 'all carriers for hire of goods shall be liable to make good to the owner of such goods all losses arising from accidental fires while in the custody or possession of such carriers.' The rule would apparently apply equally to innkeepers and stablers. Attempts by common carriers to limit their liability by advertisements and notices made to their employers were by some decisions of the English Courts, if the knowledge was distinctly brought home to the employer, held to be legal and sufficient. The Act 1 Will. IV. c. 68 (Carriers Act) has now placed the liability of carriers *by land* on the following footing. By § 4 such notices are put an end to; and it is enacted that a common carrier by land shall not be liable for loss or injury to jewels, gold and silver, bills, notes, title-deeds, and other articles enumerated, where the value shall exceed £10, unless at the time of delivery to the carrier or his agent the value and nature of such property shall have been declared by the sender, and an increased rate of charge paid if required. The statute does not affect special contracts."—MOIR. Railway companies are further subject to 17 & 18 Vict. c. 31 (Railway and Canal Traffic Act). By it they may make special conditions, but these are not binding unless signed by the party whose goods are being

Notices by  
Carriers:  
Carriers Act.

How far masters of ships are bound by that edict.

common rules, was found necessary *ad reprimendam improbitatem hoc genus hominum* (l. 3, § 1, *navit. caup.*, 4, 9). Not only the masters of ships, but their employers, are liable upon this edict (l. 1, § 2, 3, *ibid.*), each of them for the share that he has in the ship (l. 7, § 5, *ibid.*) But by the present custom of trading nations, goods brought into a ship do not fall under it unless they are delivered to the master or mate, or entered into the ship books.<sup>(l)</sup> Carriers fall within the intendment of this edict; and practice has extended it to vintners within borough (*Forbes v. Steil*, Feb. 17, 1687, M. 9233). The extent of the damage sustained by the party may be proved by his own oath *in litem*; *White v. Crocket*, Dec. 4. 1661, M. 9233.<sup>(m)</sup>

Sequestration.

(30)

12. Sequestration, whether voluntarily consented to by the parties or authorised by the judge, is a kind of deposit; but as the office of sequestree, to whose care the subject in dispute is committed, is not considered as gratuitous, he cannot throw it up at pleasure, as a common depositary may do; and he is liable in the middle degree of diligence.

Consignation.

(31)

Consignation of money is also a deposit. It may be made either where the debt is called in question by the debtor, as in suspension; or where the creditor refuses to receive his money, as in wadaets, &c. The risk of the consigned money lies on the consigner where he ought to have made payment and not consignation; *E. Queensberry v. D. Bucclouch*, July 9, 1675, M. 10,119; or has consigned only a part; or has chosen for consignatory a person neither named by the parties<sup>(n)</sup> nor of

On whom the risk of the consigned money lies.

carried, and unless they are just and reasonable. Carriers are also liable for due care in the conveyance of travellers (see note F at the end of Bk. III.)

(l) Shipowners are not liable, without their actual fault or privity, for loss of any goods by accidental fire, or of gold, silver, diamonds, watches, jewels, or precious stones, by robbery, embazement, making away with, or secreting the same, unless their true value is inserted in bills of lading, or otherwise declared in writing; 17 & 18 Vict. c. 104, § 503. And by 25 & 26 Vict. c. 63, § 54, shipowners are not liable for incidental damage to goods beyond a certain amount proportioned to the ship's tonnage.

(m) Under the modern law of evidence the amount of damage may be proved by any evidence competent, including that of the party.

(n) *Scott v. Selbie*, Feb. 28, 1836, 14 S. 574.

good credit. The charger or other creditor runs the risk, if he has charged for sums not due, or has without good reason refused payment; by which refusal the consignation became necessary; *Scot v. Somervail*, July 28, 1665, M. 10,118. It is the office of a consignatory to keep the money in safe custody till it be called for: if therefore he puts it out at interest, he must run the hazard of the debtor's insolvency; but, for the same reason, though he should draw interest for it, he is liable in none to the consigner.(o) (See iii. 9, 21, *ad. fin.*)

Consigned money ought not to be put to interest.

13. Pledge, when opposed to wadset, is a contract by which a debtor puts into the hands of his creditor a special moveable subject in security of the debt to be redelivered on payment. Where a security is established by law to the creditor, upon a subject which continues in the debtor's possession, it has the special name of an hypothec.(p) Of hypothecs in moveables there was a great variety among the Romans; but our law has, for preserving the free currency of trade, reduced them to a narrower compass. Tradesmen and ship carpenters have an hypothec on the house or ship repaired, for the materials and other charges of reparation; *Watson v. Arbuckle*, Nov. 16, 1711, M. 6262; but not for the expense of building a new ship; *Maxwell v. Wardroper*, 1726, M. 6266; because the necessity is not so urgent.(q) Owners of ships have an hypothec on the cargo for the freight; *Mure v. Lord Lyon*, Dec. 1683, M. 6260;(r) heritors on the fruits of the ground; the landlords on the *invecta et illata*, for their rents (ii. 6, 26). Writers also, and agents, have a right of

Pledge.

(33)

Hypothec.

Hypothecs instituted by the law of Scotland.

(34)

(o) "Now consignation is made in banks, and bank interest is due;" Bell's Pr. 215. And a trustee is not allowed to make profit by trust-funds.

(p) *I.e.*, a tacit hypothec. The law of Scotland recognises no conventional hypothecs except *bottomry* and *respondentia*.

(q) There is no hypothec for repairs in a home port. Builders and repairers of ships in a home port, though they have a right of retention if the ship is in their entire possession (*Cooper v. Barr & Shearer*, June 6, 1873), have no hypothec; *Hamilton Wood*, 1788, M. 6269, Hailes 1039, aff. 3 Pat. 148; *Wood v. Weir's Crs.*, Jan. 31, 1810, F.C.; Bell's Com. i. 527, ii. 97.

(r) No such hypothec is recognised; but there is a lien or right of retention; Bell's Pr. 1422.

A pledge cannot be sold without sentence.

hypothec, or more properly of retention, on their constituent's writings for their claim of pains and disbursements.<sup>(s)</sup> A creditor cannot, for his own payment, sell the subject impignorated, even after denunciation to the debtor, as he might have done by the Roman law (l. 4, *de pign. act.*, 13, 7). He must apply to the Judge-Ordinary for a warrant to put it up to public sale or roup; and to this application the debtor ought to be made a party.<sup>(t)</sup>

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NOTE (A).

OBLIGATIONS AND CONTRACTS.

Obligations proper and contracts distinguished.

"Obligations proper are distinguished from contracts in this, that the former are unilateral, the latter mutual. There must, no doubt, be always two parties concerned, the one who becomes bound, and the other in whose favour the obligation is undertaken; but

Law-agent's retention.

(s) "This is not a security of an active nature, for under it the agent can do nothing but retain. He cannot dispose of the writings to others for value; and the value of the right of retention to himself depends entirely on the point whether they are required by the employer for any purpose which cannot be attained without their production. It is confined strictly to security for professional accounts,—proper law work done,—but within that range it covers previous accounts unpaid. Duties to Government, such as legacy-duty or inventory-duty, feu-duties, and composition paid to the superior for entries, are not included; *Lidderdale's Crs. v. Naismyth*, 1749, M. 6248. This covers all title-deeds, securities, and documents of debt which have come into his hands in the agent's character of agent; not those which have not come into his hands in that character; nor deeds belonging to third parties, which may have come into his hands along with the papers belonging to his employer. Being a proper lien or right of retention, it expires with possession."—MOIR.

Pawnbrokers.

(t) "The Legislature has by various Acts of Parliament laid down stringent regulations as to persons engaging in the trade of pawnbroking; such as requiring from them a stamped license; the keeping of a record in which the article itself and the name of the pawner shall be stated; restricting them from taking pawns before or after certain hours; from exacting more than a certain rate of interest; from selling the pledged article till after a twelvemonth has elapsed, &c.; Bell's Pr. 209."—MOIR. The leading statute now is "The Pawnbrokers Act," 1872, 35 & 36 Vict. c. 13.

the latter comes under no counter-obligation, *e.g.*, where a party promises to pay or perform something to another. In a contract, on the other hand, *e.g.*, of sale, while the one party becomes bound to deliver, the other comes under the counter-obligation of paying the price."

"The essence of obligation is consent given by a person not incapacitated by nonage, disease, imbecility, or insanity, and without essential error, force, or fraud." Consent essential.

"Error voids the obligation or contract only where it is in substantial, *e.g.*, error as to the quality of the subject of contract. Thus it is implied in mercantile contracts that the article shall be merchantable, otherwise there is no sale; *Dickson v. Kincaid*, Dec. 16, 1808, F.C., where the seller of turnip seed, which turned out to be of a kind unfit for farming purposes, was found liable in damages though he had acted in *optima fide*. So in *Baird v. Pagan*, Dec. 14, 1765, M. 14,240. A modification of this principle has been introduced by the Mercantile Law Amendment Act, 1856, sect. 5 of which enacts, 'that where goods shall, after the date of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods with all faults shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods shall have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose.' It seems doubtful, however, whether under these last words 'unless the goods shall have been expressly sold,' &c., the same liability would not still attach which was enforced in the cases cited."(a) Error in substantialibus.

"Force or fear, to invalidate a contract, must be of such a degree as would shake a person of firmness and resolution, which will vary according to age, sex, or condition." Force or fear.

"Fraud, says Mr Bell (Pr., § 13), to invalidate a contract must have formed the inductive cause of the contract; so also Pothier. Hence the distinction between fraud inducing, and fraud incidental to, a contract, *e.g.*, where a party voluntarily intending to contract is merely deceived in *modo contrahendi*. The former kind annuls the contract, the latter founds a claim of damages, to the extent of Inductive and incidental fraud.

(a) At least when the purchaser had no opportunity of seeing the goods. See also *Hardie v. Austin & M'Aslan*, May 25, 1870, 8 Macph. 802.

the injury sustained. If a party acquire goods by a fraud *dans causam contractui*, e.g., if he pay for them by a forged banknote, the sale is void. The question arises, How far will the fraud affect his creditors and purchasers from him? Against the creditors the vendor may vindicate his right, reduce the sale, and recover the goods; and, even if they have been resold, but not yet paid for by the purchaser, he has a preferable claim over the price in a question with the creditors of the vendee; *Robertson v. Udnies and Patullo*, July 27, 1757, M. 4591. But against a *bonâ fide* purchaser of goods acquired by fraud, who has paid the price, the original seller has no claim. Such a purchaser trusts nothing to the personal credit of the seller, whereas the creditors, in taking the benefit of property acquired by fraud, would be adopting the fraud."

Concealment. "What constitutes a fraud sufficient to void a contract is a question of circumstances, on which no abstract rule can be laid down. The more common form of fraud is falsehood or misrepresentation, but undue concealment is an equally effectual form, and will also annul the contract. Thus, if there be some latent defect in the subject of contract, known to the seller, but not obvious to the buyer, and which, if known by him, would materially affect his estimate, or prevent the purchase altogether, the seller is bound to disclose it, and its intentional concealment will void the contract."

Consent, how proved. "Assuming consent to be deliberately and fairly given by a capable party, the proof of it depends on the character of the subject. In some cases, as in conveyances of land, or obligations affecting land, written evidence is necessary, both in proof and solemnity. So also in the case of guarantees, which are now by the Mercantile Law Amendment Act null unless reduced to writing—though formerly proveable by parole, if they had been followed by *rei interventus*. Generally speaking, the ordinary mercantile contracts may be proved by parole."

Effect of obligations. "Obligations ground a claim for payment or performance; and if the debtor does not or cannot perform, they give a claim of damages for non-fulfilment to the extent of what the obligee has thereby lost or been prevented from gaining, with the expenses of the proceedings for obtaining reparation. If an obligant fail to deliver goods at the time stipulated, he is liable for the highest rate which the article brought in the market up to the time when the obligee was enabled to give delivery by buying elsewhere."(b)

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(b) The latter cases rather leave the whole matter to the jury; *Watt*

"Some contracts are illegal by statute, *e.g.*, contracts entered into on the footing of evading payment of income-tax; *Fergusson Blair v. Allan*, Nov. 17, 1858, 21 D. 15. By the Act 1594, c. 220, the purchase of heritage which is the subject of a depending suit, by a member of the college of justice, is declared null. The *pactum de quota litis*, or a bargain by an advocate or law-agent to receive a share of the subject in dispute in remuneration of his professional services, is unlawful at common law; and, according to the spirit of the Statute 1594, the principle of the rule has been held to apply to an obligation by a client to pay a sum by way of gift to the agent, over and above his usual law-charges; *Anstruther v. Wilkie*, Jan. 31, 1856, 18 D. 405." Contracts void by statute.

"Some contracts are void at common law. Of such are contracts of an immoral nature, *contra bonos mores*, *e.g.*, a bond for compounding a crime; for procuring a pardon; for the price of prostitution. But a distinction is drawn between an obligation granted as an inducement to concubinage and one granted subsequently to such a connection as a provision due for an injury inflicted. On a bond of the latter description action will lie." Contracts void at common law.

"Contracts without being absolutely immoral, may be illegal, if they are prejudicial to the feelings of third parties, or offensive to decency, or to the public peace, or involve an inquiry concerning personal defects or blemishes; *Du Bost v. Beresford*, 1810, 2 Campbell 511; *Da Costa v. Jones*, Cowper 729. Contracts of the nature of wagers (*sponsiones ludicræ*) are valid in England, but not in Scotland; *O'Connell v. Russell*, Nov. 25, 1864, 3 Macph. 89. Gaming contracts, or securities granted for gaming debts, are illegal and void in both countries; *Paterson v. Macqueen*, March 17, 1866, 4 Macph. 602."

"Contracts inconsistent with public policy, imposing restraints on marriage, or for evading the revenue-laws, or obstructing the war-policy of the country, are illegal. Obligations in restraint of

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*v. Mitchell*, July 4, 1839; *Higgins v. Dunlop*, July 2, 1847, 9 D. 1407, aff. Feb. 24, 1848, 6 Bell's App. 195. Professor Bell (Prin. 33) prefers the English rule, viz., that the measure of damages is the price in the market at the stipulated time of delivery, or, where goods are sold expressly for exportation, the market-value at the intended place of re-sale. In England the purchaser cannot recover the loss of profits on a re-sale at home, which the jury may award him according to the rule of the Scotch cases (*Williams v. Reynolds*, 34 L. J., Q. B. 221; Addison on Contracts, 7th ed. 473. See *Howie v. Anderson*, Jan. 14, 1848, 10 D. 355).

the liberty of the subject are void if unqualified, *e.g.*, a contract of service for life; *Reid v. Scot*, 1687, M. 9505. But an obligation not to trade within a certain district is not illegal; *Stalker v. Carmichael*, 1735, M. 9455."(c)

Obligations  
contracted on  
Sunday.

"Obligations contracted on Sunday are lawful in Scotland, though not in England; *Duncan v. Bruce*, 1684, M. 15,003; *E. of Cassilis v. M'Martin*, 1627, M. 15,001. But this applies only to private and not to judicial acts; *Oliphant v. Douglas*, 1663, M. 15,002."

Co-obligants.

"Co-obligants are generally bound only for their own proportional share of the debt. Exceptions: All are liable, *singuli in solidum*, (1) if the obligation bear that the money is for the use of one, or be for a town or corporation; (2) if the obligants are taken bound as co-principals and full debtors; (3) if they are bound jointly and severally; (4) if they are bound conjunctly; (d) and (5) if the subject of obligation be indivisible, or *ad factum præstandum*; Bell's Pr. § 54. Co-obligants are generally held to be bound only *pro ratâ* in the absence of the words 'jointly and severally,' 'jointly,' or 'conjunctly.' But bills and promissory notes by usage bind the obligants conjunctly and severally without the use of these words; 'nay even,' says Bell, 'where it is otherwise expressed.' But the co-obligant who has paid more than his share is entitled to relief from his co-obligant."

Gratuitous  
obligations:  
Donation.

"Gratuitous obligations, such as pure donations, are equally binding with onerous ones, except that in certain cases, as in marriage, they are revocable; and in questions with creditors, if the party at the time of making them was insolvent, they are reducible."

Usage of trade.

"In all mercantile contracts, the usage of trade, when general, is, if not departed from by special agreement, held incorporated with the contract, and read as part thereof."—MOIR.

## TIT. II.—OF OBLIGATIONS BY WORD OR WRIT.

i. and iii. 3, 88)

1. There is nothing in the law of Scotland analogous to the *verborum obligatio* of the Romans, which was created by

(c) *Watson v. Neuffert*, July 14, 1863, 1 Macph. 1110; *M'Intyre v. M'Raid*, March 13, 1866, 4 Macph. 571.

(d) But see Menzies's Lectures, p. 206 (3rd ed. 211). See also below, tit. iii. §§ 25, 27, 29.

the parties uttering certain *verba solennia*, or words of style : and therefore the appellation of *verbal* may be properly enough applied by us to all obligations to the constitution of which writing is not essential, which includes both real and consensual contracts ; but as these are explained under separate titles, obligations by word, in the sense of this rubric, must be restricted either to promises or to such verbal agreements as have no special name to distinguish them. Agreement implies the intervention of two different parties who come under mutual obligations to one another. Where nothing is to be given or performed but on one part, it is properly called a *promise*, which as it is gratuitous, does not require the acceptance of him to whom the promise is made. An offer, which must be distinguished from a promise, implies something to be done by the other party ; and consequently is not binding on the offerer till it be accepted with its limitations or conditions by him to whom the offer is made ; after which it becomes a proper agreement.<sup>(a)</sup> The different methods of proof required for supporting these different obligations are to be explained (iv. 2, § 11, 12).

Verbal agreement.

Promise.

Offer and acceptance.

2. Writing must necessarily intervene in all obligations

Writing must intervene in obligations concerning heritage.

(a) The acceptance must precisely meet the offer ; if a condition be annexed, that is substantially a new offer, requiring acceptance by the original offerer (*Johnston v. Clark*, Nov. 21, 1855, 18 D. 70). The acceptance, according to the usage of trade, should be communicated in course of post, or within a reasonable time, if the parties reside in the same place. If a letter of acceptance be once posted, the acceptance is completed, and the bargain is not affected by accidental delay in the delivery (*Higgins v. Dunlop*, July 2, 1847, 9 D. 1407 ; aff. Feb. 24, 1848, 6 Bell's App. 105). So the contract is complete by the acceptance of an offer despatched before the acceptor receives a letter from the offerer retracting his offer (*Thomson v. James*, Nov. 13, 1855, 18 D. 1). If the recal of an offer or acceptance reach the acceptor or offerer before or simultaneously with the offer or acceptance, both are to be read together, and the party so recalling is not bound (*Thomson v. James*, *cit.* ; *Alexander v. C. of Dunmore*, Dec. 15, 1830, 9 S. 190). The easy and natural rule is, that an absent offerer is understood to say, " If you receive no notice to the contrary, you shall be entitled to hold me as continuing my offer up to the time of posting or despatching your acceptance, which, if done *debito tempore*, shall bind the contract." — *Per Lord Deas in Thomson v. James*, *supra*. See below, b. iii. t. 3, § 36, note.

(2, 3, 4)

*Locus  
pœnitentiae*

when excluded.

and bargains concerning heritable subjects, though they should be only temporary; as tacks, which, when they are verbal, last but] for one year.(b) In these no verbal agreement(c) is binding, though it should be referred to the oath of the party; for, till the writing is adhibited, law gives both parties a right to resile as from an unfinished bargain,(d) which is called *locus pœnitentiae*. Yet it has been adjudged that a written offer to sell, signed by one of the parties, when it is delivered on and verbally accepted by the other, becomes obligatory to the offerer; though there should be no written acceptance or other obligation signed by the party to whom the offer is made; *Ferguson v. Paterson*, Nov. 23, 1748, M. 8440.(e) If, upon a verbal bargain of lands, part

(b) See *Goldston v. Young*, Dec. 8, 1868, 7 Macph. 188, and above, b. ii. t. 6, § 10.

(c) Or defective and informal writing; *Grieve v. M'Farlan*, 1790, M. 8458, Hailes 1089.

Conveyance of  
land, and obli-  
gation to  
convey.

(d) As a conveyance of Scotch heritage, "no writing can avail that is not framed both in point of style and in point of formality according to the law and practice of Scotland."—*Per curiam* in *Purvis's Trs. v. Purvis's Exrs.*, March 23, 1861, 23 D. 812. "The effect of a conveyance of land may be operated indirectly by granting an obligation to dispose, even in a foreign country, provided the writing which imposes the obligation be executed with the formalities of the place (*secundum legem loci contractus*); Elchies 'Annot.' p. 4; *Govan v. Boyd*, Dec. 10, 1890, M. 4476. A gratuitous conveyance of land,—i.e., an actual conveyance in point of form, as contrasted with an obligation to convey,—invalid by the law of Scotland, either in regard to the proper solemnities not having been used, or in regard to the proper dispositive words having been omitted, will not have effect given to it either as a deed of conveyance or as importing an obligation to convey (*E. Dalkeith v. Book*, 1729, M. 4464). But Lord Kames (Pr. of Eq. 551) and Mr. Ross (L. C. i. 118) hold that 'an onerous conveyance of land, though not effectual as a conveyance itself, will be held to import an obligation to convey, and will in that view afford ground of action against the grantor and his heirs to implement the implied obligation.' The point cannot yet be considered as absolutely decided, though I think in plain equity a conveyance ought to afford clear evidence of an obligation to convey."—MOIR. The above rule as to strictness of formality has been relaxed in the case of *mortis causâ* deeds by the Tit. to Lands Consol. Act, 1868, § 20; and in the case of other deeds by the Conveyancing Act, 1874, § 27.

(e) This sentence is omitted in the Inst., and the law is there more correctly laid down, that "where an agreement concerning heritage is

of the price shall be paid by him who was to purchase, the *interventus rei*, the actual payment of money, creates a valid obligation, and gives a beginning to the contract of sale (*Laury v. Maxwell*, Dec. 23, 1697, M. 8425): and in general, wherever matters are no longer entire, the right to resile seems to be excluded. An agreement whereby a real right is passed from or restricted, called *pactum liberatorium*, may be perfected verbally (*Kerr v. Hunter*, Feb. 8, 1666, M. 8465); for freedom is favourable, and the purpose of such agreement is rather to dissolve than to create an obligation. (g) Writing is also essential to bargains made under condition that they shall be reduced into writing; for in such cases it is *pars contractus* that, till writing be adhibited, both parties shall have liberty to withdraw; *Campbell v. Douglas*, Jan. 12, 1676, M. 8470. (h) In the same manner, verbal or nuncupative testaments are rejected by our law; but verbal legacies are sustained where they do not exceed £100 Scots (iii. 9. § 2).

3. Anciently, when writing was little used, deeds were executed by the party appending his seal to them; but even then the presence of witnesses at the sealing was necessary, as appears by our oldest writings yet extant (see R. M., l. 2,

executed in the form of mutual missives, both missives must be probative, otherwise either party may resile, as in the case of an incomplete minute or contract; and, of consequence, a written offer verbally accepted may be resiled from (*Stair*, i. 10, §§ 3, 9; *Fulton v. Johnston*, 1761, M. 8446). In *Barron v. Rose*, 1794, M. 8463, which confirms the doctrine of the Inst., it was observed on the Bench that "the case of *L. Kilkerran (Ferguson) v. Paterson* proceeds entirely upon specialties, though it has erroneously been supposed to be a decision upon the general point of law." Perhaps it may be regarded rather as a case of unilateral obligation or promise (sec. 1), than one of offer and acceptance; see Bell's Com. i. 328.

(g) It cannot be said that this principle has been recognised in any modern case. Obligations constituted by probative writing require a probative discharge. But it may be said that renunciations or *pacta liberatoria* may be proved by oath of party, for if admitted on oath there is no reason to doubt their genuineness (*Dickson on Evid.* §§ 241, 242); or even by parole evidence of facts and circumstances inferring abandonment or modification (*Dickson on Evid.* §§ 161 *et seq.*, 624 *et seq.*).

(h) But distinguish "whether an agreement preceding a more solemn deed is meant to *suspend* or to *bind* the bargain" (Bell's Com. i. 328).

Subscription  
by the party  
before wit-  
nesses, or by a  
notary for him.

c. 38, § 1; Craig, 186, § 17). For preventing frauds that might happen by appending seals to false deeds, the subscription also of the grantor was required by 1540, c. 117; and if he could not write, that of a notary. But this Act not having expressly required the subscription of the witnesses, it was thought sufficient to insert their names in the body of the deed. As it might be of dangerous consequence to give full force to the subscription of the parties by initials (the first letters of the name and surname), which is more easily counterfeited, our practice, in order to sustain such subscription, seems to require a proof, not only that the grantor used to subscribe in that way, but that *de facto* he had subscribed the deed in question (*Coutts v. Straiton*, June 21, 1681, M. 6842, 16,804); at least such proof is required if the instrumentary witnesses be still alive; *Galloway v. Thomson*, 1683, M. 16,805; *Thomson v. Shiel*, July, 1729, M. 16,810.

(9-14)

4. As a further check, it is provided by 1579, c. 80, that all writings carrying any heritable right, and other deeds of importance, be subscribed by the principal parties, if they can subscribe; otherwise by two notaries before four witnesses specially designed (or distinguished).<sup>(i)</sup> The subsequent practice extended this requisite of the designation of the witnesses (according to the plain intendment of the statute) to the case where the parties themselves subscribed; but in regard that the words of the Act were not clear in that particular, therefore when the witnesses were not specially designed in a deed, or perhaps not so much as named, the party founding on it was, by the indulgence of our judges, allowed to condescend who the witnesses were; which condescendence was to be instructed, either by the witnesses themselves, if alive, or *ex comparatione literarum*

The omission  
to design wit-  
nesses not now  
suppliable.

<sup>(i)</sup> Blind persons who can write may subscribe their own deeds, and their knowledge of the contents is presumed till the contrary is proved (*Duff v. E. of Fife*, Nov. 30, 1819, F.C.; rev. July 17, 1823, 1 S. App. 498); but in their case subscription by notaries is competent and usual (*Reid v. Baxter*, Dec. 19, 1837, 16 S. 273; aff. Feb. 19, 1840, 1 Rob. 66). By the Conveyancing Act, 1874, § 41, it is sufficient that the deed of a person unable to write be subscribed in his presence and by his authority, by one notary or justice of the peace, before two witnesses.

where they were deceased, and had also subscribed as witnesses. And this obtained with respect to all deeds granted after this statute till the Act 1681, c. 5, which declares the omission of the designations not suppliable by any condescence; *Urquhart v. Officers of State*, 1753, M. 9919.<sup>(k)</sup> Custom has construed obligations for sums exceeding £100 Scots to be obligations of importance, which is probably founded on Act S., June 8, 1597, establishing that sum as the standard, beyond which payments were not allowed to be proved by witnesses. In a divisible obligation, *ex gr.*, for a sum of money, though exceeding £100, the subscription of one notary is sufficient, if the creditor restricts his claim to £100. But in an obligation indivisible, *e.g.*, for performance of a fact, if it be not subscribed in terms of the statute it is void. When notaries thus attest a deed, the attestation or docquet must specially express that the granter gave them a mandate to sign;<sup>(l)</sup> nor is it sufficient that this be mentioned in the body of the writing; *Birrel v. Moffat*, June 18, 1754, M. 16,846.

What obligations are deemed of importance.

Notaries must express the mandate in the docquet.

5. In every deed, the name of him who writes it, with his dwelling-place or other mark of distinction, must be inserted (1593, c. 175).<sup>(m)</sup> The witnesses must, by the fore-

The writer's name must be inserted.

(13, 14)

(k) See below, note (m).

(l) And that the deed was read over to him in presence of the witnesses.

(m) By § 38 of the Conveyancing Act, 1874, the want of these formalities does not render a deed improbate. It is sufficient that the designations of witnesses follow their subscriptions, and they may be added by any person at any time before the writing is recorded for preservation, or founded on in any court. It is not necessary that the number of pages be mentioned, or that the writer or printer be named or designed. By § 39, no writing subscribed by the granter, and bearing to be attested by two witnesses, shall be denied effect because of informality in the execution, but the burden of proving that it was so subscribed by the granter and by the witnesses shall lie on the party using or upholding it; and such proof may be led either in any proceeding in which the writing is founded on, or in a special application to the Court of Session, or to the sheriff within whose jurisdiction the defender resides. In *M'Laren v. Menzies*, July 20, 1876, 3 R. 1151, where a deed of more than one sheet had been signed by the granter and witnesses on the last page only, it was held competent to prove *prout de jure* that it was a "writing

said Act 1681, both subscribe as witnesses, and their names and designations be inserted in the body of the deed. And all subscribing witnesses must know the granter, and either see him subscribe, or hear him acknowledge his subscription, (n) otherwise they are declared punishable as accessory to forgery. (o) Deeds, decrees, and other securities, consisting of more than one sheet, may be written by way of book, in place of the former custom of pasting together the several sheets, and signing the joinings on the margin; provided each page be signed by the granter (p) and marked by its number, and the testing clause express the number of pages; 1696, c. 15. (q)

Deeds may be written bookwise.

Solemnities of notarial instruments,

6. Instruments of seisin are valid if subscribed by one notary before a reasonable number of witnesses (August 1584, c. 4), which is extended by practice to instruments of resignation. Two witnesses are deemed a reasonable number to every deed that can be executed by one notary (*Bishop of Aberdeen v. Kenmure*, July 15, 1680, M. 3011). In instruments of seisin, of resignation *ad remanentiam*, and of intimation, the witnesses must subscribe, and their names and designations must be inserted in the instrument (1681, c. 5). Seisins were allowed, by 1686, c. 17, to be written bookwise;

(15, 17)

subscribed by the granter " within the meaning of § 39 of the Act. In *Thomson's Trs. v. Easson*, Nov. 2, 1878, 6 R. 141, it was held no objection to a petition under § 39 that the informality consisted of the want of the designations of the subscribing witnesses. In *Tener's Trs. v. Tener's Trs.*, June 28, 1879, 6 R. 1111, a deed was sustained in which one of the witnesses had subscribed after the granter's death.

(n) But he may acknowledge it otherwise than in words (*Cumming v. Skeoch Trs.*, May 31, 1879, 6 R. 963).

(o) The question has been raised whether, when the genuineness of the granter's signature is admitted, it is a relevant ground of reduction that the attesting witnesses neither saw it adhibited nor heard the granter acknowledge it (*Smith v. Bank of Scotland*, Jan. 25, 1821, F.C., June 4, 1824, 2 S. App. 265). The granting of issues upon this question in recent cases appears to assume that the question must be answered in the affirmative (see *Couston v. Miller*, Feb. 24, 1862, 24 D. 607; *Morrison v. M'Lean's Trs.*, Feb. 27, 1862, 24 D. 625).

(p) See *supra*, note (m).

(q) The testing clause may be written by a different person, who need not be named and designed (*Watsons v. Scot*, 1683, M. 16,860).

the notary attesting the number of leaves, and signing each leaf, with the witnesses. As the number of leaves was seldom condescended on or specified, as the Act directed, an objection founded on that omission was repelled; *Clark v. Waddell*, 1752, M. 14,333, App. "Sasine," 1. But by Act S., Jan. 17, 1756, not only is this condescendence required in seisins, but the marking of each page by its number, in terms of 1696, c. 15, which related not to seisins, but to securities. Executions by messengers and other officers of the law were at first valid, barely by affixing their stamp or signet, without subscription; 1540, c. 74. The subscription of the officer came to be required by 1592, c. 139; and, at last, by 1686, c. 4, the subscription also of witnesses is made necessary, and the necessity of stamping taken off.<sup>(r)</sup> The Act 1681 requires also the designation of the witnesses, in certain sorts of executions, viz., inhibition, interdiction, horning, and arrestment. Executions therefore of summonses fall not under this Act (*Napier v. Elphinston*, Dec. 8, 1636, M. 16,889), for the enumeration of some particulars implies the exclusion of all others. It is not necessary that the witnesses to a notarial instrument, or execution, see the notary or messenger sign; for they are called as witnesses to the transaction which is attested, and not to the subscription of the person attesting (see *Lord Gray v. Hope*, July 5, 1710, M. 16,892).

7. A new requisite has been added to certain deeds since the Union for the benefit of the revenue. They must be executed on stamped paper, or parchment, paying a certain duty to the Crown. Charters, instruments of resignation, seisins, and retours of lands holden of a subject, are charged with 2s. 3d. of duty; 10 Ann. c. 19. Bond, tacks, contracts, and other personal obligations, paid at first 6d. (12 Ann. stat. 2, c. 9, § 21), to which a further duty of 1s. has been since added by 30 Geo. II. c. 19; bail-bonds are specially excepted from the statute 12 Ann. Neither do bills, testa-

and of execu-  
tions by  
messengers.

Deeds must be  
written on  
stamped paper

(21)

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(r) One witness is sufficient for service or execution of any writ, diligence, citation, or charge, except poinding (13 & 14 Vict. c. 36, § 20; 1 & 2 Vict. c. 114, sched. No. 2).

ments, discharges, or acquittances of rent, or of interest, nor any judicial deeds, as notarial instruments, bonds of cautionry in suspensions, &c., fall under it.<sup>(s)</sup>

Is the mention  
of the date or  
place neces-  
sary?

(18, 6)

Blank bonds.

8. The inserting of the time and place of subscribing, being a strong guard against forgery, is considered by Visc. Stair (iv. 42, 19) as essential to all deeds; but the contrary has been found by two judgments; *Duncan v. Scrimzeour*, Feb. 15, 1706, M. 16,914; *Ogilvie v. Baillie*, July 21, 1711, M. 16,896. The granter's name and designation are essential, not properly as solemnities, but because no writing can have effect without them. Bonds were, by our ancient practice, frequently executed without filling up the creditor's name; and they passed from hand to hand, like notes payable to the bearer. But as there was no method for the creditor of a person possessed of these to secure them for his payment, all writings taken blank in the creditor's name are declared null, as covers to

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(s) A specification of the various stamp-duties now in force would here be out of place. It is *pars judicis* to enforce the stamp-laws, so that an objection to a document on the ground that it is unstamped may be stated at any stage of a cause (*Home v. Purves*, June 7, 1838, 14 S. 898); but not in a suspension of a final decree; *Napier v. Carson*, Feb. 7, 1828, S. 500; *Barbour v. Grierson*, May 27, 1828, 6 S. 860. Stamp-duty may now be paid into Court during a trial or proceeding along with the amount of the penalty; 31 & 32 Vict. c. 100, §§ 41, 42. Unstamped documents are admissible as evidence in criminal proceedings; 17 & 18 Vict. c. 83, § 27; or to refresh the memory of a witness where the matters to which they refer may competently be proved by parole (*Dickson on Evid.* 1014); or to prove facts collateral to their purpose, as receipts for rent to prove tenancy; *Ross v. Matheson*, June 25, 1847, 9 D. 1366, rev. 6 Bell's App. 374; *Bannatyne v. Wilson*, Dec. 13, 1855, 18 D. 230. Provision is made for after-stamping deeds, except promissory-notes, bills, and policies of sea-insurance, which must be adequately stamped from the beginning. Deeds made in foreign countries, and not stamped with the stamp-duty there required, are commonly said to be admissible in British Courts, on the principle that the Courts of one country are not bound to enforce the revenue-laws of another (Bell's Pr. 328; *James v. Catherwood*, 3 Dowl. & Ry. 190). But this doctrine has been questioned, and must now be held not to apply where the stamp is a formality, the want of which makes the deed void by the *lex loci actus* (*Bristowe v. Sequeville*, 5 Ex. 275; Westlake's Priv. Intern. Law, §§ 176, 201).

fraud, with the exception of indorsations of bills of exchange; 1696, c. 25.(t)

9. Certain privileged writings do not require the ordinary solemnities. (1) Holograph deeds (written by the granter himself) are effectual without witnesses. A deed is holograph where the substantial of it are written by the granter; *Vans v. Mulloch*, Jan. 23, 1675, M. 16,885. The date of no holograph writing except a bill of exchange(u) (see next section), can be proved by the granter's own assertion, in prejudice either of his heir or his creditors, but must be supported by other adminicles; *Braidy v. Fairny*, June 21, 1665, M. 12,275. (2) Testaments, if executed where men of skill in business cannot be had,(v) are valid, though they should not be quite formal; *Ker v. Hay*, Jan. 1, 1708, M. 16,968. And, let the subject of a testament be ever so valuable, one notary signing for the testator, before two witnesses,

Privileged  
deeds.

(22-24)

Holograph  
writings.

Testaments.

(t) The Act contemplates only formal deeds, not bills and notes blank in the payee's name (*Ogilvie v. Moss*, 1804, M. App. "Bill of Exch." 17); nor drafts and orders *in re mercatorid*, bills of lading, and such like.

(u) And a debtor's written acknowledgment of intimation of an assignation (*Newton & Co. v. Collogan & Co.*, 1785, M. 850; Bell's Com. ii. 17; see 25 & 26 Vict. c. 85, § 2); and by the Conveyancing Act, 1874, § 40, in absence of evidence to the contrary, holograph testamentary writings are deemed to be of the date they bear.

(v) This matter is more correctly stated in the Inst. l. c. thus:—"Testamentary deeds are so much favoured that if the testator's intention appear sufficiently they are sustained, though not quite formal, especially if they be executed where men of skill in business cannot be had."—The *penuria jurisperitorum* is not a necessary condition to their being sustained. The doctrine has now been established, that one who conveys his property to trustees by a probative deed, may in that deed prescribe to the trustees the kind and degree of evidence as to his intentions on which they are to act in the distribution of his estate, i.e., he may declare that a writing not legally probative, already executed or to be afterwards executed, shall be sufficient as an expression of his will. The question, whether a particular writing is identified as one of those referred to in the probative deed, is one of fact (*Inglis or Buchan v. Harper*, May 27, 1828, 6 S. 864, rev. Oct. 13, 1831, 5 W. & S. 785; *Baird v. Jaap*, July 15, 1856, 18 D. 1246; *Wilson's Trs. v. Stirling*, Dec. 13, 1861, 24 D. 163; *Young's Trs. v. Ross*, Nov. 3, 1864, 3 Macph. 10; *Callander v. Callander's Trs.*, Dec. 17, 1863, 2 Macph. 291).

is in practice sufficient. Clergymen were frequently notaries before the Reformation; and though they are, by 1584, c. 133, prohibited to act as notaries, the case of testaments is excepted; so that these are supported by the attestation of one minister, with two witnesses. (3) Discharges to tenants are sustained without witnesses, from their presumed rusticity or ignorance in business; *Boyd v. Storie*, Nov. 7, 1674, M. 12,456, 16,968. (4) Missive letters *in re mercatorid*, commissions, and fitted accounts in the course of trade, and bills of exchange, though they are not holograph, are, from the favour of commerce, sustained without the ordinary solemnities.(w)

Discharges to  
tenants.

Merchants'  
accounts or  
letters.

Bills of  
exchange

(25)

10. A bill of exchange is an obligation in the form of a mandate, whereby the drawer or mandant desires him to whom it is directed to pay a certain sum, at the day and place therein mentioned, to a third party.(x) Bills of exchange are drawn by a person in one country to his correspondent in another; and they have that name because it is the exchange, or the value of money in one place compared with its value in another, that generally determines the precise extent of the sum contained in the draught. The creditor in the bill is sometimes called the possessor, or *porteur*. As parties to bills are of different countries, questions concerning them ought to be determined by the received custom of trading nations, unless where special statute interposes. For this reason, bills of exchange, though their form admits not of witnesses, yet prove their own dates,

prove their  
own dates.

(w) The following may also be reckoned among privileged writings:— (1) Deeds relating to sums under £8, 6s. 8d., which are held not to be "of great importance" in the sense of 1579, c. 80; (2) prorogations and devolutions in submissions, as being *quasi* judicial acts; (3) foreign deeds regarding moveables, *ex comitate*; (4) bonds granted to the Queen "in the form heretofore in use in the Court of Exchequer in Scotland," 19 & 20 Vict. c. 56, § 38; (5) the signature of a subscriber to the memorandum or articles of association of any company formed under the Companies Act 1862, which is sufficiently attested by one witness, 25 & 26 Vict. c. 89, §§ 11, 16; (6) and the same is provided in regard to deeds connected with the sale and mortgage of ships (17 & 18 Vict. c. 104, §§ 55, 56).

(x) Or order; Inst. l. c.

in questions either with the heir or creditors of the debtor (*Kennedy v. Arbuthnot*, 1725, M. 12,615); but if this doctrine should be extended to the case of such inland bills as are made payable to the drawer himself, and where, consequently, the only persons concerned are the drawer and acceptor, heirs might, by antedated bills, be cut off from the plea of death-bed, and creditors from the benefit of inhibition; Bankton, vol. i. 364.(y)

11. A bill is valid without the designation either of the drawer or of the person to whom it is made payable. It is enough that the drawer's subscription appears to be truly his; and one's being possessor of a bill marks him out to be the creditor, if he bears the name given in the bill to the creditor. Nay, though the person drawn on should not be designed, his acceptance presumes that it was he whom the drawer had in his eye; *Grierson v. E. Sutherland*, 1727, M. 1447. Bills drawn blank in the creditor's name fall under the statute 1696; for, though indorsations of bills are excepted from it, bills themselves are not.(z) Not only the Solemnities of bills. (26-28)

(y) "The distinction here taken would not now be entertained;" see Ivory's note, Inst. l. c. It is decided that a legacy or *donatio mortis causæ* cannot be constituted by bill (*Fulton v. Blair*, 1722, M. 1411; *Wright v. Wright*, 1761, M. 8088; see below, t. 3, § 29).

(z) This doctrine has been overruled, and bills have been sustained as documents of debt, though not as warranting summary diligence, when the name of the drawee has been left blank; *Ogilvie v. Moss*, June 28, 1804, M. App. "Bill," 17. When a bill or note is issued without date, it is now competent to prove the date of issue, but summary diligence is not competent on such bills; 19 & 20 Vict. c. 60, § 10. "A party signing his name on a blank piece of paper bearing a bill-stamp, either as drawer, acceptor, or indorser, will be liable in the character in which he signs for any sum afterwards filled in which is covered by the stamp. And in like manner, where a bill is drawn so carelessly as to admit of an alteration in the sum without detection, the parties to the bill will be liable to the onerous holder of it for the full amount as altered. But if the alteration is so obvious that it could not deceive one of ordinary vigilance, the bill is good for the original amount only (*Hall v. Fuller*, 5 B. and Cr. 750; *Pagan v. Wyllie*, 1793, M. 1660; *Graham v. Gillespie*, 1795, M. 1453)."—MOIR. A party may also be liable as drawer or acceptor of a bill signed by another for him per procuracion; but the authority of party so signing must be express or clearly implied (per L. J. Clk. in *London Joint Stock Bank v. Stewart*, July 15, 1859, 21 D. 1331).

- person drawn upon must sign his acceptance, but the drawer must sign his draught before any obligation can be formed against the acceptor; bills being really mandates. Yet it is sufficient in practice that the drawer signs before the bill be produced in judgment, though it should be after the death both of the creditor and acceptor; *Cathcart v. Dick's Repres.*, 1748, M. 1439, Elch. "Bill," 41. A creditor in a bill may transmit it to another by indorsation, though the bill should not bear to his order; by the same rule that other rights are transmissible by assignation, though they do not bear to assignees; *Crichton v. Gibson*, 1726, M. 1446.(a)
- Indorsation.** 12. The drawer, by signing his draught, becomes liable for the value to the creditor in the bill, in case the person drawn upon either does not accept, or, after acceptance, does not pay; for he is presumed to have received value from the creditor at giving him the draught, though it should not bear for value received: but if the drawer was debtor to the creditor in the bill before the draught, the bill is presumed to be given towards payment of the debt unless it expressly bears *for value*; *Cheap v. Arnot*, July 18, 1712, M. 1537.
- Obligations on the drawer;**  
(29, 27) The person drawn upon, if he refuse to accept, while he has the drawer's money in his hands, is liable to him in damages. As a bill presumes value from the creditor, indorsation presumes value from the indorsee; who, therefore, if he cannot obtain payment from the acceptor, has recourse against the indorser, unless the [bill be indorsed in these words, *without recourse*.
- on the person drawn upon;**  
**on the indorser;**
- Effects of payment by the acceptor;**  
(30) 13. Payment of a bill by the acceptor acquits both the drawer and him at the hands of the creditor; but it entitles the acceptor, if he was not the drawer's debtor, to an action of recourse against him; and if he was, to a ground of compensation. Where the bill does not bear value in the hands of the person drawn upon, it is presumed that he is not the drawer's debtor; and consequently he has recourse against the drawer *ex mandato*; *Cunningham v. Agnew*, July 4, 1711, M. 1531.(b)

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(a) *Robertson v. Burdekin*, Nov. 14, 1843, 6 D. 17.

(b) This doctrine is incorrect. A bill is presumed to be granted or indorsed for value received whether that is expressed or not, and the

14. Bills, when indorsed, are considered as so many bags of money delivered to the onerous indorsee; which, therefore, carry right to the contents, free of all burdens that do not appear on the bills themselves.<sup>(c)</sup> Hence a receipt or discharge by the original creditor, if granted on a separate paper, does not exempt the acceptor from second payment to the indorsee; hence, also, no ground of compensation competent to the acceptor against the original creditor can be pleaded against the indorsee: but if the debtor shall prove, by the oath of the indorsee, that he paid not the full value for the indorsation, the indorsee is justly considered as but a name;<sup>(d)</sup> and, therefore, all exceptions receivable against the original creditor will be sustained against him; *Crawfurd v. Piper*, Jan. 15, 1708, M. 1524.

Bills are considered as cash.

(31)

contrary can be proved in the absence of special circumstances only by the holder's writ or oath; *Wallace v. Barrie*, 1793, M. 1484; *Brock v. Newlands*, Nov. 11, 1863, 2 Macph. 71. An acceptor who wishes to exclude the presumption may do so by accepting "for honour," Inst. l. c.

(c) "Indorsation, if made before the bill has become due, carries the right to the debt subject to no exception pleadable against the indorser. But it was farther held in Scotland, that though a bill is indorsed long after it has become due, yet, if it bear no mark of having been dishonoured, the indorsee is subject to no exception pleadable against the drawer and indorser. But when it had been retired and so marked, and again put into circulation, or dishonoured and noted on the bill as such, the indorsee was held liable to latent exceptions. This rule has now been altered, and the law of Scotland is assimilated to that of England by § 16 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 60), which provides 'that when any bill shall be indorsed after the period when it became payable, the indorsee shall be liable to all objections or exceptions to which the bill was subject in the hands of the indorser,'—i.e., according to the law of England, to those equities which arise out of the bill itself, but not to those which might exist between the original parties arising from collateral transactions [see *Brown v. Bain and Purdie*, June 3, 1864, 2 Macph. 1143]. Formerly, it was not necessary for the holder of a bill lost, stolen, or fraudulently acquired, to prove that he gave value for it; the value was still presumed, and the want of value could only be proved by his writ or oath. But 19 & 20 Vict. c. 60, § 15, enacts that, 'where any bill or note has been lost, stolen, or fraudulently obtained, the holder shall be bound to prove that value for the same was given by him; but such proof may be made by parole evidence.'—Morr.

(d) That is, to the extent to which it shall be thus proved that he paid no value, and therefore holds the bill in trust for the indorser.

Negotiation or  
diligence  
required in  
the creditor.

(32)

15. Bills must be negotiated by the possessor, against the person drawn upon, within a precise time, in order to preserve recourse against the drawer. It might be thought that where a bill is payable so many days after sight, the possessor ought, without delay, to present for acceptance, and, in cases of refusal, protest; because the least delay in presenting such bill prolongs the term of payment, in prejudice of the drawer. Yet the contrary doctrine has prevailed in practice, that, in bills payable so many days after sight, the creditor has a discretionary power of fixing the payment somewhat sooner or later, as his occasions shall require; *Andrew v. Syme & Co.*, 1759, M. 1584.(e) It is unquestionable that bills payable on a day certain, need not be presented for acceptance till the day of payment, because that day can neither be prolonged nor shortened by the time of acceptance; *Ferguson v. Malcolm*, 1727, M. 1558; *Jamieson v. Gillespies*, 1749, M. 1579, 1494, Elch. "Bill," 44.(f) For the same reason, the acceptance of bills, payable on a precise day, need not be dated; but where a bill is drawn payable so many days after sight, it must; because there the term of payment depends on the date of the acceptance.

Days of grace.

(33, 34)

16. Though bills are, in strict law, due the very day on which they are made payable, and may therefore be protested on the day thereafter; yet there are three days immediately following the day of payment, called *days of grace*, within any of which the creditor may protest the bill.(g) But if he delay protesting till the day after the last day of grace, he loses his recourse; *Cruikshanks v. Mitchell*, Jan. 29, 1751, M. 1576. Where a bill is protested either for

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(e) Yet it must be presented "within a reasonable time," and it is a jury question whether there has been undue delay; Bell's Com. i. 108; Prin. 336.

(f) But if, in point of fact, the bill has previously been presented for acceptance, and acceptance has been refused, the holder is bound to give immediate notice to the drawer and prior indorsers, otherwise he will lose recourse against them.

(g) Unless they be payable on demand at sight or on presentation; 34 & 35 Vict. c. 74. See also as to Bank Holidays, 34 & 35 Vict. c. 17.

not-acceptance, or payment, the dishonour must be notified to the drawer or indorser, within three posts at furthest.<sup>(h)</sup> This strictness of negotiation is confined to such bills as may be protested by the possessor upon the third day of grace. Where, therefore, bills are indorsed after the days of grace are expired, the indorsee is left more at liberty, and does not lose his recourse, though he should not take a formal protest for not-payment, if within a reasonable time he shall give the indorser notice of the acceptor's refusing to pay; *Young v. Forbes*, 1749, M. 1580. Not only does the possessor, who neglects strict negotiation, lose his recourse against the drawer, where the person drawn upon becomes afterwards bankrupt, but also though he should continue solvent; for he may, in that case, recover payment from the debtor, and so is not to be indulged in an unnecessary process against the drawer, which he has tacitly renounced by his negligence; *Littlejohn v. Allan*, Dec. 1744, M. 1569. Recourse is preserved against the drawer, though the bill

Bills indorsed  
after the term  
of payment.

When does the  
creditor lose  
recourse  
against the  
drawer?

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(h) Fourteen days were formerly allowed by statute for giving notice in the case of inland bills; but by 19 & 20 Vict. c. 60, § 14, the rules in use in the case of foreign bills are made applicable to inland bills also; and by § 12, bills drawn in any part of the United Kingdom are to be held inland bills. "Failure to give the requisite notice absolutely bars recourse, whether the parties to whom it should have been given have suffered any injury through the want of notice or not. Verbal notice has been held sufficient,—the proof of notice having been given being always thrown on the party seeking recourse. As to the time of giving notice, nothing seems more fixed than that it shall be given in reasonable time, and that in the construction of the term reasonable, a very short period has been allowed. Thus, in *Smith v. Mullet*, 2 Camp. 208, an indorser, who had got notice of the dishonour of a bill on Monday did not send off a notice to the preceding indorser, who also lived in London, till after post hours on Tuesday, so that the indorser did not get it till Wednesday. He was held guilty of laches, and was non-suited. The necessity of a protest to prove dishonour is now done away with by 19 & 20 Vict. c. 60, § 13, which provides, 'that it shall be sufficient to prove presentment and dishonour, to the effect of preserving recourse by other competent evidence, either written or parole; provided always that nothing herein contained shall be taken to affect the necessity for a notarial protest, in order to entitle the holder of any bill or note to proceed with summary diligence thereon.'"—MORR.

should not be duly negotiated, if the person drawn upon was not his debtor; for there the drawer can qualify no prejudice by the neglect of diligence, and he ought not to have drawn on one who owed him nothing.

Privileges of  
bills by  
statute.

(35, 36)

17. The privileges superadded to bills by statute are, that though by their form they can have no clause of registration, yet if duly protested, they are registrable within six months after their date, in case of not-acceptance, or in six months after the term of payment, in the case of not-payment; which registration is made the foundation of summary diligence, either against the drawer or indorser, in the case of not-acceptance, or against the acceptor in case of not-payment; 1681, c. 20. This statute is extended, by 1696, c. 36, to inland bills, *i.e.*, bills both drawn and made payable in Scotland.(i) After acceptance, summary diligence lies against no other than the acceptor; the drawer and indorser must be pursued by an ordinary action.(j) It is only the principal sum in the bill, and interest, that can be charged for summarily. The exchange, when it is not included in the draught, the re-exchange incurred by suffering the bill to be protested and returned, and the expense of diligence, must all be recovered by an ordinary action; because these are not liquid debts, and so must be previously constituted; but in the case of suspension, they may be added to the charge, 1681, c. 20.

Inland bills or  
precepts.

Certain bills  
are not  
privileged.

(37, 28, 24)

18. Bills, when drawn payable at any considerable distance of time after date, are denied the privileges of bills; for bills are intended for currency, and not to lie as a security in the creditor's hands; *Lesly v. Nicholson*, 1725, M. 5766.(k) Bills are not valid which appear *ex facie* to be

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(i) See above, p. 323, note (h).

(j) By 12 Geo. III. c. 72, §§ 42, 43, and 23 Geo. III. c. 18, § 55, summary diligence is equally competent against the drawer and all the indorsers jointly and severally, unless the indorsation be "without recourse."

(k) Since 12 Geo. III. c. 72, bills retain their extraordinary privileges for six years (*Robertson v. M'Glashan*, 1787, M. 11,129). Bills may be made payable at any day, however distant, if it be a day that must come (*Colehan v. Cooke*, Willes' R. 393 *Goss v. Nelson*, 1 Burr. 226, 1 Ross' L. C. 28, 25; *Campbell v. Campbell*, 1793, Bell's Ca. 111).

donations; *Weir v. Parkhill*, Nov. 25, 1736, M. 1413.(l) No extrinsic stipulation ought to be contained in a bill which deviates from the proper nature of bills; hence a bill to which a penalty is adjoined is null (see *Henderson v. Sinclair*, 1727, M. 1418); and a bill with a clause of interest from the date; *Douglas v. Brown*, 1757, M. 1429.(m) Inland precepts drawn, not for money, the medium of trade, but for fungibles, were, by the former practice, admitted as probative, though without the privileges of bills (*Douglas v. Erskine*, 1715, M. 1397); but by later decisions they have been declared null, as wanting the writer's name and witnesses.(n) Promissory notes without writer and witnesses were adjudged to be null; *Arbuthnot v. Scot*, Jan. 29, 1708, M. 12,255. It was afterwards the opinion of the court that they required no witnesses: *King v. Esdale*, Dec. 7, 1711, M. 12,256. But it is agreed by all that they are not entitled to the special privileges of bills; *Gordon v. Forbes & Innes*, 1739, M. 712, 12,256.(o)

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(l) There is still no authority for supporting a bill granted as a pure donation. Yet a bill granted in security of a promise of marriage which was not fulfilled was sustained (*Calder v. Proven*, 1742, M. 9511, Elch. "Bill," 25, aff. Cr. & St. 349). But a donation may competently be made by the indorsation of a bill (*Barbour v. Hair*, 1753, M. 6097; *Steele v. Wemyss*, 1793, M. 1409). In *Law v. Humphrey*, July 20, 1876, 1 R. 1193, an action by the drawer of a bill against the acceptor, the plea of non-onerosity was held not to be *per se* a good defence.

(m) A bill with a clause of interest from its date is effectual (see *Sword v. Blair*, 1790, M. 1433; Bell's Com. i. 389).

(n) The law is averse to the multiplication of negotiable instruments. Hence the House of Lords denied the validity of a note undertaking to deliver to the bearer a certain quantity of iron when required after a certain date: *Bovill v. Dixon*, Feb. 21, 1854, 16 D. 619; H. L. July 29, 1856, 3 Macq. 1. But in the *Merchant Banking Company of London v. Phoenix Bessemer Steel Company* (Feb. 7, 1877, 46 L. J., Ch. 418) it was held by Jessel, M. R., that iron warrants, bearing to be assignable by indorsement, were, by the usage of the trade, negotiable instruments; and § 5 of the Factors' Act, 1877 (40 & 41 Vict. c. 39) seems to recognise that instruments may become negotiable by custom.

(o) By 12 Geo. III. c. 72, promissory notes are put on the same footing as bills with respect to diligence, interest, indorsation, and the privileges of indorseees. Bank-notes are promissory notes. Bank-cheques also have many points of resemblance to bills. They do not, however,

Solemnities of  
deeds signed  
in a foreign  
country.

(39, 40)

19. As for the solemnities essential to deeds signed in a foreign country, when they come to receive execution in Scotland, it is a general rule that no laws can be of authority beyond the dominions of the lawgiver. Hence, in strictness, no deed, though perfected according to the law of the place where it is signed, can have effect in another country where different solemnities are required to a deed of that sort. But this rigour is so softened *ex comitate*, by the common consent of nations, that all personal obligations, granted according to the law of that country where they are signed, are effectual everywhere (*Junquet la Pine v. L. Semple's Crs.*, 1721, M. 4451); which obtains even in obligations to convey heritage; *Cunningham v. Semple*, July 5, 1706, M. 4462.(p) Conveyances themselves, if they are of heritable subjects, must be perfected according to the law of the country where the heritage lies, and from which it cannot be removed (*E. Dalkeith v. Book*, Feb. 1729, M. 4464); but a conveyance of moveables, which have no fixed seat, and are therefore said to follow the owner, if it be perfected according to the *lex domicilii*, will receive execution in Scotland; *Sinclair v. Murray*, July 16, 1636, M. 4501; *Scot v. Toish*, 1676, M. 4502.(q)

Delivery,

(43)

20. A writing, while the granter keeps it under his own power or his doer's, has no force; it becomes obligatory only

assign to the payee funds which the drawer has in the hands of the banker, unless they be sufficient to meet the cheque. They are generally drawn in favour of bearer, and pass from hand to hand by simple tradition; but they are sometimes indorsed, and if it was intended to add to the value of the document by the indorsation, the indorser will be liable. The dangers arising from their falling into improper hands led to the system of writing across them the name of a banker, or merely drawing two cross-lines, with the words "& Co." between them. As to the effect of a crossing, "general" or "special," see 39 & 40 Vict. c. 81.

(p) *Govan v. Boyd*, 1790, Bell's Ca. 223; *E. Hopetoun v. Scots Mines Co.*, 1856, 18 D. 739; *Purvis's Trs. v. Purvis's Exrs.*, 1861, 23 D. 812.

(q) This distinction between conveyances of heritage and of moveables is considerably modified in favour of *mortis causâ* deeds. By 31 & 32 Vict. c. 101, § 20, any testamentary writing so expressed and executed that it would be an effectual settlement or bequest of moveables, may be effectual as a settlement of Scotch land also. See Savigny's *Private Internat. Law*, transl. by Guthrie, 2nd ed., p. 174 *et seq.*

after it is delivered to the grantee himself, or found in the hands of a third person. As to which last, the following rules are observed :—A deed found in the hands of one who is doer both for the granter and grantee, is presumed to have been put in his hands as doer for the grantee; *Seton*, 1735, n.r. The presumption is also for delivery, if the deed appears in the hands of one who is a stranger to both; see *Stair*, iv. 42, § 8.(r) Where a deed is deposited in the hands of a third person, the terms of depositions may be proved by the oath of the depositary (*Hay v. Wright*, March 5, 1624, M. 12,378); unless where they are reduced into writing; *Cowan v. Ramsay*, Feb. 24, 1675, M. 12,379.(s) A deed appearing in the custody of the grantee himself is considered as his absolute right;(t) insomuch that the granter is not allowed to prove that it was granted in trust, otherwise than by a written declaration signed by the trustee, or by his oath; 1696, c. 25.

and depositions  
of deeds.

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(r) In the Inst. l. c., the author points out that Lord Stair here fails to distinguish between an onerous deed in the hands of a third party, which is presumed to be held for the grantee, and a gratuitous deed, which is presumed to be held for the granter or debtor (*Holwell v. Cumming*, 1796, M. 11,583; Bell's Pr. 23).

(s) The writing must be probative (*Logan v. Logan*, Feb. 27, 1823, 2 S. 253). Even where the third party is agent for both parties, the doctrine of the text, that delivery is presumed, though adopted by Professor Bell, Pr. § 23, is scarcely supported by modern decisions. The question is one of intention, and each case depends on its own circumstances (*Ramsay v. Maule*, Jan. 15, 1828, 6 S. 342, aff. March 25, 1830, 4 W. & S. 83; *Maiklam v. M'Gruthar*, March 29, 1842, 4 D. 1182; *Mair & Sons v. Thoms, &c.*, Feb. 20, 1850, 12 D. 748, where a bond in the hands of an agent for both parties was held as delivered in respect of the sum actually advanced, and undelivered in respect of a balance not yet advanced).

(t) This doctrine is not to be taken without qualification, for the law does not create an absolute presumption in this case in favour of the granter. The whole circumstances of the case, including the nature of the deed, must be looked at, and the question put in issue will generally be, whether the deed was delivered with the intention of putting it absolutely beyond the control of the granter. It depends on the nature of the deed whether mere possession presumes delivery, so as either to limit the proof or throw the *onus* of disproving delivery on the granter (*M'Aslan v. Glen*, Feb. 17, 1859, 21 D. 511; see *Collie v. Pirie's Trs.*, Jan. 22, 1851, 13 D. 506).

What deeds  
are effectual  
without  
delivery.

(44)

21. The following deeds are effectual without delivery:—(1) Writings containing a clause dispensing with the delivery. These are of the nature of revocable deeds where the death of the granter is equivalent to delivery, because after death there can be no revocation. (2) Deeds in favour of children, even natural ones; for parents are the proper custodiers or keepers of their children's writings; *Aikenhead v. Aikenhead*, Feb. 25, 1663, M. 16,994. For a similar reason, post-nuptial settlements by the husband to the wife need no delivery; *L. Lindores v. Stewart*, 1715, M. 6126. (3) Rights which are not to take effect till the granter's death, or even where he reserves an interest to himself during his life; for it is presumed he holds the custody of these merely to secure to himself such reserved interest; *Hadden v. Shorswood*, June 19, 1668, M. 16,997. (4) Deeds that the granter lay under an antecedent natural obligation to execute—e.g., rights granted to a cautioner for his relief; *Dick v. Oliphant*, Jan. 18, 1677, M. 6548. (5) Mutual obligations—e.g., contracts; for every such deed, the moment it is executed, is a common evident to all the parties contractors; see *Simpson v. Strachan*, Dec. 17, 1736, M. 17,007.(x) Lastly, the publication of a writing by registration is equivalent to delivery; *Bruce v. Bruce*, 1675, M. 11,185.(y)

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(x) A decree-arbital, contrary to the earlier practice, is now held to have no force till delivered to the parties, put on record, or placed beyond the arbiter's power with a view to delivery; *Robertson v. Ramsay*, 1783, M. 653; *Macnair v. Gray and Woodrop*, May 31, 1827, 5 S. 735, aff. July 8, 1831, 5 W. & S. 305. But when the submission is at an end, or it otherwise appears that the arbiter is *functus officio*, a signed award, though in the hands of the arbiter, may have effect as delivered (*M'Quaker v. Phoenix Assurance Co.*, March 19, 1859, 21 D. 794; see Inst. l. c., and Ivory's note, 99).

(y) This is the general rule with regard to registration for execution, and in the Register of Sasines, but it seems that the presumption thence arising may be redargued (see *per* Lord Deas in *Burnet v. Morrow*, March 26, 1864, 2 Macph. 929). Registration for preservation appears to be only one circumstance to be taken into account along with others in questions as to delivery (*Leckie v. Leckies*, 1776, M. 11,581, and App. "Presumption," 1; *Downie v. M'Killop*, Dec. 5, 1843, 6 D. 180).

TIT. III.—OF OBLIGATIONS AND CONTRACTS ARISING FROM  
CONSENT, AND OF ACCESSORY OBLIGATIONS.

1. Contracts *consensual*—*i.e.*, which might by the Roman law be perfected by sole consent, without the intervention either of things or of writing, are *sale, permutation, location, society*, and *mandate*. Where the subject of any of these contracts is heritable, writing is necessary.<sup>(a)</sup> Consensual contracts.

2. *Sale* is a contract, by which one becomes obliged to give something to another, in consideration of a certain price in current money to be paid for it. *Arrhae*, or earnest,<sup>(b)</sup> is sometimes given by the buyer as an evidence that the contract is perfected; but this is not necessary. Earnest was computed in the price by the Roman law; but what is given here under that name is generally so inconsiderable that it is *dead* earnest—*i.e.*, not reckoned in the price. Things not yet extant, and consisting merely in hope, may be the subject of this contract, as the draught of a net, &c.; l. 8, § 1, *de contr. empt.* (18, 1). Commodities, where their importation or use is absolutely prohibited, cannot be the subject of sale; and, even in run goods, no action lies against the vendor for not-delivery, if the buyer knew the goods were run; 11 Geo. I. c. 30; <sup>(c)</sup> see *Scougal v. Gilchrist*, Nov. 16, 1736, M. 9536.<sup>(d)</sup> The price in current (2)  
Earnest.  
(5)  
What things the subject of sale.  
(3)  
The price how ascertained.

(a) Thus “sales of land are invariably carried through by missives, or articles of roup, or writing of some kind. By statute the sale of a ship requires to be carried through in the same way, by a bill of sale, generally termed in Scotland a vendition, and an entry in the register at the ship’s port, the vendition being exhibited to the collector; and the sale is not completed to the effect of passing the property in the ship or part of the ship sold till either the certificate of registry is produced and an indorsement made on it, or a new registry is made and certificate granted to the vendee. Writing is also required in the sale of copyrights, or of goods bonded for duties in the warehouse of the importer.”  
—MOIR.

(b) Earnest is now nearly obsolete, except in contracts of hiring of servants.

(c) Repealed by 30 & 31 Vict. c. 59, except §§ 5, 9, 32, 39, 43, 44.

(d) Illegality is always a good defence to an action on a contract—*e.g.*, if it be for the sale of libellous or indecent prints; if it violate a law

money(e) may be fixed, either (1) by the agreement of parties at making the contract; in which case, let it be ever so disproportioned to the value of the subject, the sale is valid by our law (*Fairy v. Inglis*, June 23, 1669, M. 14,231): though it was otherwise by the Roman; l. 2, C. *de rescind. vend.* (4, 44). Or (2) by a reference either to a third person, or even to one of the contractors themselves; *E. Montrose v. Scot*, March 13, 1639, M. 14,155.(f)

designed for the protection of the revenue; or if it be inconsistent with the national war-policy. The result of the decisions relative to contracts tainted by smuggling has been thus stated:—"No contract for importing or exporting goods in order to defeat the revenue-laws can be enforced, whether the person so acting be a native or a foreigner. The mere sale by a merchant abroad, whether a native of this country or a foreigner, of goods which the buyer afterwards smuggles into this country, is not illegal, nor is action denied upon the contract to the seller. Every one participant in the attempt to evade the revenue-laws, by furnishing the means of facilitating the intention to smuggle, is held a party to the illegal contract, and action is denied to him. On a sale of goods prohibited to be imported, or known to be smuggled, action will not be sustained for the price, on the one hand, or for the delivery of the goods, on the other. The purchase in *bonâ fide* of goods not prohibited, but which have been smuggled, is effectual" (Bell on Sale, 22).

(e) Where a subject is sold by weight or measure, it must be according to the standards appointed by statute: that now in force is 41 & 42 Vict. c. 49. But a sale may be made by any local weight which is a multiple of the standard measure (*Robertson v. Gow*, June 25, 1858, 20 D. 1170; *Miller v. Mair*, Feb. 3, 1860, 22 D. 660); and where the place of fulfilment of a contract is in a foreign country, the weights or measures there used are held to have been intended by the parties, unless otherwise expressed (*Rosseter v. Cahlmann*, 8 Exch. 261; *Schuurmans v. Stephen*, June 25, 1833, 11 S. 779; Savigny's Private International Law, transl. by Guthrie, 2nd ed., pp. 245, 246).

(f) "The price is an essential part of the contract. It must either be fixed as a certain sum of money, or referred to a standard by which it may be at once ascertained. The rule is *Certum est quod certum reddi potest*. But though a price be not fixed, if delivery of the subject be given, the party receiving it is not allowed to retain it without paying its reasonable value—*i.e.*, its market-value (*Wilson v. M. Breadalbane*, June 14, 1859, 21 D. 957). When the term of payment is not specified, the sale is presumed to be a ready-money one, and the seller may cancel it if the money be not paid. When there is a special condition of ready money, this suspends the passing of the property, even in a question with creditors. If there be a clear and substantial error as to the price,

3. Though this contract may be perfected before delivery(g) of the subject, the property remains till then with the vendor; ii 1, § 10.(h) Notwithstanding which, if the

*Periculum rei venditæ necdum traditæ.*

(7)

the contract is null, because there is no *consensus in idem placitum* (*Sword v. Sinclairs*, 1771, M. 14,241). The same result follows if the subject supposed by the parties to exist turn out to have been lost or destroyed before the sale."—MOIR.

(g) On the subject of delivery, see Note A at end of this title.

(h) "Accordingly, as the law stood, though the purchaser had paid the price, the seller's creditors might attach the goods in case of bankruptcy, the seller being merely entitled to rank on his estate for the price paid. Again, if the goods had been delivered, but the price not paid, the seller, in the event of the bankruptcy of the purchaser, could not demand back the goods, but could only rank for the unpaid price. But the Mercantile Law Amendment Act, 19 & 20 Vict. c. 98, § 2, 'provides that where goods have been sold, but not delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of the seller, after the date of the sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser.' There must be a *bonâ fide* sale, and the price paid or tendered. The Act would not apply to the case of a mere security given under the form of a sale. Nor was it the intention of the Legislature to allow goods to remain indefinitely with the seller after the sale; for if they were permitted to remain so long as to create a false credit on the faith of reputed ownership, they would still be exposed to the risk of being carried off by the trustee in bankruptcy. Another important modification was introduced by this section. Formerly, as goods sold but undelivered remained the property of the seller, he was entitled to retain, even though the price had been paid, on the ground that the purchaser was indebted to him on some other account; and this even to the effect of preventing a sub-purchaser from obtaining delivery (*Mein v. Bogle & Co.*, Jan. 17, 1828, 6 S. 360; *Melrose v. Hastie*, March 7, 1851, 13 D. 880). While the law as now altered does not interfere with the seller's right to retain for other debts or obligations in a question between him and the first purchaser, it excludes this right of retention if the original purchaser has resold the subject to a second purchaser who demands delivery. But nothing in this Act affects the seller's right of retention for payment of the price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any

subject perished, it perished by the Roman law to the buyer (§ 3, Inst. *de empt. et vend.*, 3, 23), contrary to the rule, *Res perit domino*; because the property in the vendor was considered to be but nominal, he being obliged to transfer it to the buyer. Lord Stair doubts whether this would hold in our practice; i. 14, § 7. But, whatever ought to be the rule in case of the extinction of the subject, it is an agreed point that the hazard of its deterioration falls on the purchaser, because he has all the profits arising from it after the sale. On the other hand, it is certain that the subject itself perishes to the vendor: (1) If it should perish through his fault, or after his undue delay to deliver it. (2) If a subject is sold as a fungible, and not as an individual or *corpus* (l. 35, § 7, *de contr. empt.*, 18, 1), e.g., a quantity of farm-wheat, sold without distinguishing the parcel to be delivered from the rest of the farm. (3) The *periculum* lies on the vendor till delivery, if he be obliged by a special article in the contract to deliver the subject at a certain place; *Spence v. Orniston*, Jan. 25, 1687, M. 3153.(i)

Exemption a  
non domino.

(8)

4. The vendor, where he is not the true owner, cannot by delivery transfer to the purchaser that property which was not his to give; but the purchaser, in respect of his *bona fides*, makes the fruits of the subject his own, till it be evicted, or at least reclaimed by the true owner; ii. 1, § 14. And as warrandice is implied in all sales,(k) the vendor

Warrandice.

(9)

right of retention competent to the seller, except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser."—MOIR. As to stoppage *in transitu*, see Note A at the end of this title.

(i) *Milne & Co. v. Miller*, Feb. 1, 1809, F.C. Further, if something remains to be done by the seller before delivery, e.g., weighing a mass when the price depended on the weight, the risk remains with him till that operation be completed (*Hanson v. Meyer*, 6 East. 614; *Rugg v. Minett*, 11 East. 209, 2 Ross's L. C. 20, 30; *Hansen v. Craig & Rose*, Feb. 4, 1859, 21 D. 432).

(k) "In every contract of sale there was, according to the law of Scotland, an implied condition or warranty that the thing sold was merchantable and fit for the purpose for which it was sold; and the seller, though quite ignorant of the latent defect, was liable if it should turn out that the article was substantially defective. In England, on the contrary, in a simple contract of sale, the rule was that the maxim *caveat emptor* applied

must make the subject good if it be evicted; ii. 3, § 11. The insufficiency of the goods sold, if it be such as would

wherever the buyer had an opportunity of examining the goods. His eye, according to the common phrase, was his merchant, and the seller was not liable for any latent defect subsequently discovered by him, unless there was an express warranty, or such a direct representation as the law construed into a warranty. The law of Scotland has now been assimilated on this subject to the law of England by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 60. The seller is not now held to have warranted the quality or sufficiency of the goods sold if at the time of the sale he was without knowledge that they were defective or of bad quality. But those cases are excepted where he gives an express warranty, or where he sells the goods expressly for a particular and specified purpose, without express warranty, in which latter case he is held to have warranted the goods as fit for the particular purpose specified. English cases illustrating the operation of the general rule are *Parkinson v. Lee*, 2 East. 313, 2 Ross's L. C. 327; *Stuart v. Wilkins*, Douglas 20. Illustrations of the exceptions are *Jones v. Bright*, 3 Moore and Payne 156, 2 Ross's L. C. 343; *Laing v. Fidgeon*, 6 Taunt. 108. If a man be both the manufacturer and seller of the goods, he is under an implied warranty that they are merchantable, but not if he sells goods manufactured by others; *Bluett v. Osborne*, 1 Starkie 384; *Fisher v. Samuda*, 1 Campb. 190. But if the seller be fully aware of the purpose for which the goods are required, it seems that it makes no difference as regards warranty whether he manufactured them or not; *Brown v. Edgington*, 2 M. & Gr. 279, 2 Ross's L. C. 375. There is, however, no implied warranty that the article sold is suitable for the buyer's purpose if, instead of ordering it to be made for a purpose which he describes, he buys a well-known article of which the seller is the patentee; *Chanter v. Hopkins*, 4 M. & W. 399, 2 Ross's L. C. 368. The alteration in the Mercantile Law Amendment Act in no way protects the seller in the case of representations by him as to the quality of the goods which he knows to be untrue. But apart from such knowledge, the incorrectness of the representation will not by itself invalidate the sale. The rule *caveat emptor* will apply; *Ormrod v. Huth*, 14 W. & M. 651, 2 Ross's L. C. 418. An express warranty must be made good to the letter, whether the quality warranted be material or not; *Budd v. Fairmaner*, 8 Bingham 38, 2 Ross's L. C. 434. On the other hand, an express warranty confined to a particular point constitutes an implied exclusion of warranty of every other quality; *ib.*—MOIR; i.e., of other special qualities, but not of fitness for the purposes for which the goods were sold (*Cooper & Aves v. Clydesdale Shipping Co.*, March 19, 1863, 1 Macph. 677). In every contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specified description, but must also be saleable or merchantable under that description (*Jones v. Just*, 3 L. R. Q. B. 197).

- have hindered the purchaser from buying(*l*) had he known it, and if he quarrels it recently, founds him in an action (*actio redhibitoria*) for annulling the contract. If the defect was not essential, he was by the Roman law entitled to a proportional abatement of the price, by the action *quantum minoris*. But as our practice does not allow sales to be reduced on account of the disproportion of the price to the value of the subject, it is probable that it would also reject the action *quantum minoris*. A vendor who covenants, by a *pactum de retrovendendo*, for a right to redeem the subject within a certain time, cannot after that time be restored against his delay by offering the redemption-money, as a reverser in a wadset might do before declarator; for in sales an adequate price is presumed to be given to the vendor, and so there is nothing penal in the irritancy; ii. 8, § 5. Permutation differs from a sale chiefly in this, that in permutation one subject is to be given in barter or exchange for another; whereas the price in a sale consists of current money.
5. Location is that contract where an hire is stipulated for the use of things, or for the service of persons. It may, without impropriety, be considered as a species of sale, in which the subject sold is the use or service, and the price is the hire, which, as in a proper sale, generally consists of money. He who lets his work, or the use of his property, to hire, is the locator or lessor; and the other the conductor or lessee.(*m*) In the location of things the lessor is obliged
- Actio redhibitoria.*  
(10)
- Pactum de retrovendendo.*  
(12)
- Permutation.  
(13)
- Location.  
(14)

(*l*) A party who objects to goods sent, either on the ground that they are not equal to sample, or that they are unmerchantable, is strictly bound, as soon as he discovers the defect, or might by timeous examination discover it, to intimate this to the seller and return the goods, or to intimate that he holds them for the seller's behoof. While objecting to the goods, he may on no account retain them for some other purpose, *e.g.*, to meet a supposed claim of damages (*Padgett v. M'Nair*, Nov. 24, 1852, 15 D. 76). The appropriation of any portion of the goods by the buyer will bar his claim to reject the rest (*Ransan v. Mitchell*, June 3, 1845, 7 D. 813).

(*m*) "In location the right of property does not pass, nor the risk. If the thing lent perishes, it perishes to the owner, unless the loss or the injury is traceable to the misconduct of the lessee. And if, without blame on the part of the lessee, the subject has been partially injured, he will be entitled to a deduction from the hire proportioned to the injury which he sustains by its diminished use or enjoyment. The

to deliver the subject fitted to the use it was let for; and the lessee must preserve it carefully, put it to no other use,<sup>(n)</sup> and, after that is over, restore it. Where a workman or artificer lets his labour, if the work is either not performed according to contract, or if it be insufficient, even from mere unskilfulness, he is liable to his employer in damages (l. 9, § 5, *locat.* 19, 2); for he ought not as an artificer to have undertaken a work to which he was not equal.<sup>(o)</sup> A servant

Obligations on  
the lessor and  
lessee.

(15, 16)

hirer is liable only for ordinary diligence. But he is responsible, not only for his own negligence, but for that of his family or servants. The rule must be taken, however, with this limitation, that the master is only liable where the servant in the course of his proper employment accidentally injures the subject lent, not where he wantonly and maliciously does so. This is a delict for which he and not his master is responsible (Story on Bailments, p. 394). Though the hirer is not bound to restore the article if it has perished without any negligence on his part, the law very naturally throws on him the proof that there was no negligence, because, being in possession of the article, he alone can have the means of knowing under what circumstances the injury took place.” —MOIR.

(n) “Baron Hume in his Lectures refers to *M’Pherson v. Sutherland*, Jan. 15, 1791 (Hume 296), where a person who had hired a horse for riding, and had put him into a plough, where he met with injury, was found liable in damages; and to a similar judgment in *Shaw v. Donaldson*, June 5, 1790 (Hume 297). If I hire a horse, said Baron Hume, to go to a certain distance, and carry it farther, where it meets with some accident, I am liable for the price. And the same if a horse be hired to carry a certain weight, and a greater load is imposed on him. Thus, one who had hired a carrier’s horse to carry sixteen stone, and instead of that made him carry twenty, in consequence of which overloading the horse died, was decreed to pay the price (*Straton v. —*, 1610, M. 3148).”—MOIR.

(o) “An agent holds himself out as possessing competent skill in law, the maker of a machine or a mathematical instrument in engineering or knowledge of the science required for its construction. The employer in such a case, it has been said, buys both his labour and his judgment. But it is ordinary and not extraordinary skill which the person employed professes to give; *spondet peritiam*, but not an extraordinary or unusual degree of knowledge of his art or profession. And if the operation to be performed is complicated and difficult, a professional man exercising the best of his ability will not be liable for failure. In *Grant v. M’Leay*, Jan. 1, 1791, Bell’s Cases 319, an action of damages for incorrectly completing a title to a debt as a ground of adjudication, it was held that as the point was one of nicety, and as the objection to the title had at first been repelled by

hired for a certain term is entitled to his full wages, though from sickness, or other accident, he should be disabled for a part of his time; but if he die before the term, his wages are only due for the time he actually served. If a master dies, or without good reason turns off, before the term, a servant who eats in his house, the servant is entitled to his full wages, and to his maintenance till that term. And, on the other part, a servant who without ground deserts his service, forfeits his wages and maintenance, and is liable to his master in damages.<sup>(p)</sup> The doctrine of location of lands is already explained; ii. 6, § 8 *et seq.*

Society.

(18, 19)

6. Society, or copartnership, is a contract whereby the several partners agree concerning the communication of loss and gain arising from the subject of the contract. It is formed by the reciprocal choice that partners make of one another; and so is not constituted in the case of co-heirs or of several legatees in the same subject. A copartnership may be so constituted that one of the partners shall, either from his sole right of property in the subject or from his superior skill, be entitled to a certain share of the profits, without being subjected to any part of the loss.<sup>(q)</sup> But a

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the Court, the agent was not liable. On the other hand, where there is an established rule from which the agent has chosen to deviate, he will be liable for the consequences of his mistake; see *Bell's Com.* i. 460.—*MOIR.* In other words, a law-agent is liable in damages for want of skill or error in law, but only where the want of skill or error is *gross*. The question whether the want of skill or negligence is of this character can only be judged of by the special circumstances of each case; but the general rule seems to be, that a law-agent is not thus liable unless his negligence or unskillfulness has been so great that "no man would be held entitled to exercise the profession if he had not better knowledge," or unless he has acted contrary to "what is clearly laid down in books of practice" (*Cooks v. Falconer's Reprs.*, Nov. 26, 1850, 13 D. 157; *Landell v. Purves*, May 27, 1842, 4 D. 1300, rev. March 10, 1845, 4 Bell 46; *Frame v. Hart and Hodge*, June 9, 1836, 14 S. 914, aff. June 18, 1839, M'L. & Rob. 595; *Hamilton v. Emslie*, Nov. 27, 1868, 7 Macph. 163).

<sup>(p)</sup> See further as to the Law of Master and Servant, Note B at the end of this title.

<sup>(q)</sup> This relates to the obligations of the partners *inter se*. "As regards the public, though there may be no written contract, a party may become liable, either from acting as a partner, or passively by allowing

society where one partner is to bear a certain proportion of loss without being entitled to any share of the profits, is justly reprobated. All the partners are entitled to shares of profits and loss proportioned to their several stocks, where it is not otherwise covenanted.(r) *Societas leonina.*

7. As partners are united from a *delectus personæ*, in a kind of brotherhood, no partner can, without a special power *Obligations on the socii;*

(22, 20, 21)

his name to be used ('holding out'), or participating in the profits of the business, though his name should not be used, or even by an agreement to receive a share of profits, though no profit has been actually drawn. Where a party was to receive an annuity which was to bear a proportion to the profits, this was held equivalent to sharing in the profits themselves. But so fine are the distinctions on this subject, at least in England, that it has at the same time been decided that it is not sufficient to make a man a dormant partner that he was paid for his labour not a share of the profits, but a sum proportioned to the profits, having no share of the capital (*Hamper*, 17 Ves. 412)."*MOTR.* Many difficult questions have been removed by 28 & 29 Vict. c. 86, which enacts that a person shall not be constituted a partner by lending money on a contract in writing that the interest shall vary with the profits, or that the lender shall receive a share of the profits (§ 1); or by a contract for his remuneration as a servant or agent by a share of profits (§ 2); or, being widow or child of a deceased partner of a trader, by receiving by way of annuity a portion of the profits of such trader (§ 3); or by receiving by way of annuity a portion of the profits of any business in consideration of the sale of the goodwill of such business (§ 4); but in the event of the bankruptcy or insolvency of the trader, such a lender or vendor of a goodwill is not entitled to recover the principal or interest of his loan, or profits stipulated, till the claims of other onerous creditors have been satisfied (§ 5).

(r) Formerly, when disputes arose as to the amount of each partner's share, the Court proceeded on the presumption of equality, giving effect, however, to any circumstances inferring a different agreement (*M<sup>r</sup>Whitler v. Guthrie*, 1822, 1 S. 295, Hume 760; *Struthers v. Barr*, May 19, 1826, 2 W. & S. 153). Now, perhaps, it is more correct to say that this is a proper jury question, and that the presumption of equality will receive effect only in the absence of evidence to the contrary (*Campbell's Tra. v. Thomson*, May 26, 1829, 7 S. 650, rev. Feb. 14, 1831, 5 W. & S. 16; *Aberdeen Bank v. Clark*, Nov. 29, 1859, 22 D. 44). Where there is not an express stipulation to that effect, no partner has a claim against the company for an extra allowance or extra share of profits, although his services or trouble in the business have greatly exceeded those of the other partners (*Beath v. Campbell, Rivers, & Co.*, Dec. 2, 1824, 3 S. 251, rev. March 3, 1825, 2 W. & S. 25; *M<sup>r</sup>Whitler, cit.*).

contained in the contract,(s) transfer any part of his share to another. Where, therefore, a third person is assumed by a partner, such assumption forms a separate contract betwixt the assumer and the assumed, limited to the share of the partner assuming, and in which the others have no concern. Upon the same principle, all benefit procured by one of the partners to himself, in a matter that naturally falls under the copartnership, accrues to the whole (*Inglis v. Austine*, March 26, 1624, M. 14,562);(t) and no partner is accountable for an error in management arising from the want of a larger share of prudence or skill than he was truly master of.

they are all bound in *solidum* for the company's debts.

(20, 23, 24)

8. All the partners are bound *in solidum* by the obligation of any one of them, if he subscribe by the firm or social name of the company; unless it be a deed that falls not under the common course of administration, as if a partner should take upon him to refer a company claim to an arbiter; *Lumsdaine v. Gordon*, Nov. 1728, M. 14,567.(u) Each part-

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(s) Such a stipulation was held valid in *Warner v. Cunningham*, 1798, M. 14,603, aff. 3 Dow 76.

(t) This case shows that the rule applies even where the acquisition is made with the partner's own funds and in his own name. An instructive example of this principle occurred in *Pender, &c., v. Hamilton* (July 20, 1864, 2 Macph. 1428), where a partner in a joint adventure, stipulating for a commission from a tradesman to whom he gave an order on behalf of the partnership, was held bound to account to other partners for the sums so obtained.

(u) While the partner of a trading firm may contract obligations on behalf of the firm by making or indorsing bills or notes, or by borrowing money (*Blair Iron Co. v. Alison*, August 13, 1855, 18 D., H. L., 49, 27 Jur. 614; *Dewar v. Miller*, 1766, M. 14,569), no obligation will be effectual against the company if it be obviously out of the sphere of the company's business (*Blair Iron Co., supra*; *Kennedy*, Dec. 22, 1814, F.C.); or if the creditor knows that in entering into the transaction the partner with whom he deals is abusing or exceeding his implied agency or his express powers under the constitution of the firm (*Miller v. Douglas*, Jan. 22, 1811, F.C.; *Johnston, Sharp, & Co. v. Phillips*, July 24, 1822, 1 S. App. 244; *Blair v. Bryson*, June 11, 1835, 13 S. 901; *M'Leod v. Tosh*, June 30, 1836, 14 S. 1058); but if the creditor acts in *bona fide*, the company is bound even by the fraud of its partner, in the line of its business (*Miller v. Douglas, supra*; *Sandilands v. Marsh*, 2 B. & Ald. 673, 3 Ross' L. C. 463; *Swan v. Steele*, 7 East. 209, 3 Ross' L. C. 459. See also *Jardine's Trustees v. Carron Co.*, May 27, 1864, 2 Macph. 1801).

ner is obliged to advance the sums necessary for carrying on the common affairs according to his share; and he is entitled to the reimbursement of the sums he has expended, or of the loss he has sustained, on that company's account, out of the common stock; and if that falls short, the other partners are liable *in solidum* to make up the loss, he bearing his own proportion thereof. The company effects are the common property of the society, subjected to its debts; so that no partner can claim a division thereof, even after the society is dissolved, till these are paid. And consequently, no creditor of a partner can, by diligence, carry to himself the property of any part of the common stock in prejudice of a company creditor; but he may, by arrestment, secure his debtor's share in the company's hands, to be made forthcoming to him at the close of the copartnership, in so far as it is not exhausted by the company debts.(x)

How far a partner's share is affectable by creditors.

9. Society being founded in the mutual confidence among the *socii*, is dissolved, not only by the renunciation,(y) but by the death of any one of them, if it be not

Society expires by death,

(25-28)

(x) "A firm validly constituted is considered by the law of Scotland a separate person from any of the individuals forming the partnership; it contracts and is bound, it may pursue and defend in the company's name (except where it has merely a descriptive name, such as the Carron Iron Company) without giving the name of any of the partners; the stock belonging to it is answerable primarily for company obligations; and the individual partners are simply guarantees or cautioners for the company, so that, although an ultimate liability attaches to them in that character, the company and the company's estate must be first discussed, for it does not appear that the provision in the Mercantile Law Amendment Act, which enables a creditor to go against a cautioner without discussing the principal, was intended to apply to the case of companies and individual partners. But as no diligence can be directed against the ideal body which forms the company, the diligence following on decret obtained against the company must necessarily be directed against the individual partners; and accordingly, where letters of horning have been obtained against a company, a charge given to the individual partners is competent (*Thomson v. Liddell*, July 2, 1812, F.C.)."—MORR.

(y) "In Scotland there must in all cases be public announcement of the dissolution, or else the copartnery subsists so far as third parties are concerned (*Dalglish and Fleming v. Sorley*, May 24, 1791, M. 14,595, Hume 746, Bell's Ca. 487). In England, where a dormant partner retires, he is not liable for the subsequent obligations of the firm, even though

or renunciation.

otherwise specially covenanted; l. 65, § 9, *pro socio* (17, 2). A partner who renounces upon unfair views, or at a critical time when his withdrawing may be fatal to the society, looses his partners from all their engagements to him, while he is bound to them for all the profits he shall make by his withdrawing, and for the loss arising thereby to the company; § 4, *Inst. de societate*, 3, 25.(z) Not only natural, but civil death, *e.g.*, arising from a sentence inflict-

notice be not given to parties dealing with the firm, and ignorant that he is a partner (*Carter v. Whalley*, 1 B. & Al. 11, 3 Ross's L. C. 635). In Scotland, on the contrary, even in the case of a dormant partner, notice of dissolution must be given to the parties dealing with the firm, just as in the case of an ostensible partner (*obiter* in *Kay v. Pollok*, Jan. 27, 1809, F.C.). But the rule of the law of England, as laid down by Lord Kenyon in *Evans v. Drummond*, 4 Esp. 89, appears more reasonable,—that in the case of a latent partner retiring, it was incumbent on the plaintiff to show that he was ever publicly known in the partnership, as there must be some publicity of his situation to which the plaintiff might be presumed to trust, otherwise he could only be charged during the time he was actually a partner and was receiving the emoluments and profits of the business. If no term of endurance has been specified, the copartnery may be dissolved at any time by the withdrawal of any of the partners; and this has been carried so far that even reasonable notice of dissolution is not required, though the partnership will continue till all antecedent contracts or obligations previously entered into shall be implemented (*Peacock v. Peacock*, 3 Ross's L. C. 607, 16 Ves. 49; *Crawshay v. Maule*, 1 Swans. 495; *Marshall v. Marshall*, Jan. 26, 1815, and Feb. 23, 1816, F.C.). Even without voluntary dissolution, and before the actual expiry of the contract, a dissolution may be decreed by a court of equity; as, for instance, where one of the copartners has been guilty of fraud, or of rash and reckless speculation in the conduct and business of the copartnership (*Crawshay v. Maule*, 1 Swans. 495, Tudor's L. C. 310; *Waters v. Taylor*, 2 V. & Bea. 299, Tudor's L. C. 329). In England the marriage of a female partner dissolves the partnership (*Nerot v. Burnand*, 4 Russ. 247).—MOIR.

(z) Professor Bell somewhat restricts this rule, and adds :—"It will not be permitted to a partner by dissolving a partnership to gain for himself a purchase which the company was about to make, or to secure the benefit of a lease held by the company, and about to expire. For although in such cases the dissolution cannot be prevented, the beneficial effects of it will be communicated to the partnership; the acquisition will be held as partnership property at the time of the dissolution" (Bell's Com. ii. 632; *Featherstonhaugh v. Fenwick*, 17 Ves. 298, 3 Ross's L. C. 615; *M'Niven v. Peffers*, Dec. 2, 1868, 7 Macph. 181).

ing capital punishment, makes one incapable to perform the duties of a partner, and consequently dissolves the society. In both cases, of death and renunciation, the remaining parties may continue the copartnership, either expressly, by entering into a new contract, or tacitly, by carrying on their trade as formerly. (a) Though this contract was dissolved by the Roman law *egestate*, by the bankruptcy of any of the partners (l. 4, § 1, *pro soc.*, 17, 2); yet, by our practice, if, after the goods are bought on the company's credit, one of the partners should fail, the rest cannot pocket up the whole profits on pretence that they run the whole risk; *Paterson v. Grant*, July 1749, M. 14,578. (b) Public trading companies are now every day constituted with rules very different from those which either obtained in the Roman law or at this day obtain in private societies. The proprietors or partners in these, though they may transfer their shares, cannot renounce, nor does their death dissolve the company,

It is dissolved  
*egestate.*

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(a) "It is not, however, the same partnership which the remanent partners continue, but a new firm" (Bell's Com. ii. 631).

(b) "Insolvency of a partner does not of itself dissolve a company, nor even bankruptcy under the Act 1696; but either constitutes a ground for dissolution by judicial sentence. Sequestration, as it transfers to the trustee for creditors all the rights of the partner, is held to operate a dissolution; and Mr. Bell (Com. ii. 634) is of opinion that the same effect would follow from a trust-deed for behoof of creditors. Insanity does not *ipso facto* dissolve a partnership, but is a good ground on which a court will interfere to dissolve a partnership. On the dissolution of any ordinary copartnery from any cause, if the contract itself does not provide for the mode of winding up, to which effect the company must subsist even after dissolution, the surviving or solvent partners are entitled to act; or if any just objections exist against them, a neutral party will be appointed by the Court for that purpose; and if sequestration be necessary, it will be granted on the petition of the surviving partners. If no special stipulation has been made in the contract as to the way in which the interest of the representatives of a deceasing or retiring partner is to be ascertained on dissolution, the value of such interest is to be ascertained, not by a valuation, but by bringing the whole stock and effects of the company to sale; although this may be attended with much inconvenience and even loss to the surviving partners anxious to carry on the old business under a renewed partnership (*Crawshay v. Collins*, July 26, 1808, 15 Ves. 218, Bell's Pr. 379)."—MOIR. See as to compensation in partnership questions, Note C at end of title.

but the share of the deceased descends to his representative.(c)

A joint trade differs from a copartnership.

(29)

10. A joint trade is not a copartnership, but a momentary contract, where two or more persons agree to contribute a sum to be employed in a particular course of trade, the produce whereof is to be divided among the adventurers, according to their several shares, after the voyage is finished. If, in a joint trade, that partner who is intrusted with the money for purchasing the goods, should, in place of paying them in cash, buy them upon credit, the furnisher, who followed his faith alone in the sale, has no recourse against the other adventurers; he can only recover from them what of the buyer's share is yet in their hands. Where any one of the adventurers in a joint trade becomes bankrupt, the others are preferable to his creditors upon the common stock, as long as it continues undivided, for the relief of all the engagements entered into by them on account of the adventure; *Crs. of Macaul v. Ramsay*, Jan. 11, 1740, M. 14,608.(d)

(c) See as to Joint Stock Companies, Note D at the end of this title.

(d) The differences between partnership and joint trade are here inaccurately stated, and indeed, by the latest writer, the distinction has been altogether rejected (Clark on Partnership, p. 40). "Joint trade being simply a limited partnership, it is regulated within the limits embraced by it by the rules applicable to partnership, whether during its existence or in winding up. The partners are liable *singuli in solidum*; each has the power of acting and binding the concern within the proper limits of the adventure; the stock and property of the concern is common, and the creditors of the joint adventure are preferable on such stock to the creditors of the individual adventurers; and on the termination of the adventure the stock and estate is divisible, according to the same rules as regulate the division on a dissolution of partnership. The chief point of difference is, 'That unless where the joint concern is avowed, and a credit raised on the combined responsibility, the liability, being the result of a partnership which was not relied on as regulating the credit, the limits of the contract are fixed by the actual agreement of the parties' (Bell's Com. ii. 649). To this it may be added, that whereas in partnership the concern is bound for purchases made by one partner for the firm, if fairly within the scope of the company's transaction, even though he may have applied the articles for his own behoof, yet in joint adventure the adventure is not liable unless the furnishings have been *in rem versum* of the joint concern. So at least the doctrine was stated by Lord President Campbell in *Withers, Birch, & Co. v. Cowan* (Nov. 16, 1790, Bell's Com. ii. 650), who said :—

11. Mandate is a contract by which one employs another <sup>Mandate.</sup> to manage any business for him ; and by the Roman law it must have been gratuitous.<sup>(e)</sup> It may be constituted tacitly, by one's suffering another to act in a certain branch of his affairs for a tract of time together without challenge. The mandatary is at liberty not to accept of the mandate ; and as his powers are solely founded on the mandant's commission, he must, if he undertakes it, strictly adhere to the directions given him : nor is it a good defence that the method he followed was more rational ; for in that his employer was the proper judge. Where no special rules are prescribed,<sup>(g)</sup> the mandatary, if he acts prudently, is secure, whatever the success may be ; and he can sue for the recovery of all the expenses reasonably disbursed by him in the execution of his office. <sup>(31-38)</sup> <sup>Obligations on the mandatary.</sup>

' Erskine's distinction means, that in proper copartnery *socii* are liable for the actings of each other, even where not *in rem versum*, while joint adventurers are so liable only for furnishings actually made to the concern.' As, in the absence of any avowed firm, the conditions of the joint adventure as arranged between the parties themselves receive effect *with all their limitations*, the liability of the joint adventurers may be limited, where according to the ordinary rules of partnership there would have been a universal responsibility. So it was held, in the case of furnishing of corn and hay to horses at a particular stage on the run of a stage-coach, that as by the precise limits of the agreement the horsing of each stage was left to individuals, the liability lay only with the proprietors of the horses of that stage to which the provender had been supplied (*Barton v. Hanson*, 2 Camp. 97, 2 Taunt. 49). The same rule was applied where a concern for coaching was found not liable for the rent of an office which had been taken by one of the partners, and which he used, but not exclusively, for the sale of the coach-tickets (*Jardine v. M'Farlane*, Feb. 16, 1828, 6 S. 564). If the goods had been ordered before the contract of joint adventure is entered into, there is no liability on the part of the joint adventure, or of any one but the party ordering the goods, though they may be afterwards brought into the stock of the joint adventure (*Bell's Com.* ii. 652)."  
—MOIR.

(e) See Bell's Pr. 218 as to gratuitous mandates, which are practically superseded by mercantile agency or factory. Trustees are examples of gratuitous mandataries.

(g) *I.e.*, either by the nature of the particular agency as defined by law and mercantile usage, or by the terms of the mandate (*Marr v. Buchanan*, Feb. 11, 1852, 14 D. 467 ; *Ramsay, Bonars, & Co. v. Mackersy*, June 4, 1840, 2 D. 1003, rev. March 9, 1843, 2 Bell's App. 30).

What is com-  
prehended  
under a general  
mandate.

(39)

12. Mandates may be general,<sup>(h)</sup> containing a power of administering the mandant's whole affairs; but no mandate, however ample, can be construed into an order to commit a crime, which, being itself criminal, cannot be inferred by implication. Neither does any mandate imply a power of disposing gratuitously of the constituent's property; nor even of selling his heritage for an adequate price: but a general mandatary may sell such of the moveables as must otherwise perish (*quæ servando servari nequeunt*).<sup>(i)</sup> No mandatary can without special powers enter the mandant heir to his ancestor, transact doubtful claims belonging to him, or refer them to arbiters.<sup>(k)</sup>

General and  
special agents.

(h) A general agent is one employed to transact all the principal's business, or all of a particular kind—as a factor to sell his goods, a broker to negotiate all contracts of a particular description, an attorney or law-agent to transact his legal business, a master in the usual employment of his ship. The authority of such an agent within the usual line of his employment is not limited by any private direction not known to those who deal with him. In the case of a special or particular agent, *i.e.*, one employed in a single transaction, it is the duty of those dealing with him to ascertain the extent of his authority, and if they fail to do so they deal with him at their own risk. It depends on the circumstances of each case whether an agency is special or general. But the adoption of the agent's acts beyond the natural limits of his employment may make the principal liable for subsequent acts of the same kind, unless, of course, the party dealing with the agent knows that he is exceeding his authority (Smith's Merc. Law, 9th ed. 124; Bell's Pr. 219, 225; *Whitehead v. Tuckett*, 15 East. 399, 3 Ross' L. C. 140; *Robertson v. Davidson*, July 4, 1815, 3 Dow 218; *Swinburne v. Western Bank*, June 13, 1856, 18 D. 1025; *Duncan v. Clyde Trs.*, Jan. 24, 1851, 13 D. 518, aff. March 17, 1853, 15 D., H. L., 36, 25 Jur. 331, 2 Stu. 57; *Robinson v. Middleton*, June 1, 1859, 21 D. 1089).

(i) "If no special directions have been given, the law implies a power of sale at such time and place as may appear most beneficial; and this power is more readily implied where, as is generally the case, advances have been made by the factor to the principal on the goods consigned."—MOIR.

(k) "The authority given to the agent implies an authority to use all necessary or usual means of carrying the main intention of the principal into effect in the best manner. But although the agent has an implied authority to use those means, of which the principal must have foreseen the necessity, and which he must be supposed to have authorised by anticipation, yet this does not extend to acts which he is induced to do upon some unexpected contingency arising, however well intended or

**13. Mandates expire** (1) by the revocation of the employer, though only tacit, as if he should name another man-

How mandates expire.

(40-43)

useful to the principal. Thus, it was held that an agent conducting the business of a mine had no implied authority to borrow money for carrying it on (*Hawtayne v. Bourne*, 7 M. & W. 595). A policy of insurance effected by an agent on a vessel which he knew to be lost, though the principal was entirely ignorant of the matter, was held void from misrepresentation. The Court remarked—‘It must be taken for granted that the principal knows what the agent knows, and there is no hardship on the plaintiff; for, if the fact had been known, the policy could not have been effected’ (*Fitzherbert v. Mather*, 1 T. R. 12, 3 Ross’ L. C. 154).”—**MOIR.** The rule seems to be, that a principal is answerable for the wrongful or fraudulent acts of his agent if committed in the course of his service and for his benefit, because he has put him in his place as to a certain class of acts; and, even where he has not authorised the particular act, is responsible for the manner in which the agent conducts himself as to that class of acts (*Barwick v. English Joint Stock Bank*, L. R., 2 Ex. 259, 36 L. J., Ex. 147; *Proudfoot v. Montefiori*, 36 L. J., Q. B. 225, L. R., 2 Q. B. 511). Differences of opinion have occurred on the question whether in given cases misrepresentations or concealments have been within the scope of the agent’s employment, and also upon the question whether they were collateral to the contract, and therefore required to be brought home to the principal, or were part of it, and therefore rendered it void, though he was not privy to them (*Cornfoot v. Fowke*, 6 M. & W. 358; *Fuller v. Wilson*, 3 Q. B. 58; *Udell v. Atherton*, 7 H. & N. 172; *Wilde v. Gibson*, 1 H. L. Ca. 605). A special application of the principle occurs in the case of companies, where the distinction has been made that the company is responsible for the frauds of agents to the extent to which it has profited by them, and cannot hold any one bound by a contract induced by the fraud of the directors; but if that other party, instead of seeking to set aside the contract, brings an action of damages, it must be against the directors personally (*Addie v. West. Bank*, June 9, 1865, 3 Macph. 899, H. L. May 20, 1867, L. R., 1 Sc. Ap. 145, 5 Macph. H. L. 80; *National Exch. Co. v. Drew*, March 9, 1855, 2 Macq. 103; *Houldsworth v. City of Glasgow Bank*, July 4, 1879, 6 R. 1164, aff., March 12, 1880, Sc. L. R. 510). “The principal is, on the other hand, entitled to enforce the contracts of his agent, subject to this rule: that if the agent be allowed to deal in his own name, the party dealing with him will enjoy the same rights against the employer as he might have exercised against the agent, had that agent really been a principal. ‘Thus,’ said Lord Mansfield, ‘where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes the principal; and though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet the purchaser may set off

Fraud or misrepresentation of agent, how far they affect the principal.

Frauds of agents of companies

Liability of third parties to principal.

datary for the same business.(l) (2) By the renunciation of the mandatary, even after he has executed part of his commission, if his office be gratuitous.(m) (3) By the death either of the mandant or mandatary; for the one is presumed to give and the other to accept the mandate, from personal regards of friendship: but if matters are not entire, the mandate continues in force, notwithstanding such revocation, renunciation, or death.(n) Procuratories of resignation, and precepts of seisin, are made out in the form of mandates; but because they are granted for the sole benefit of the man-

Mandates  
*gratid mandata-*  
*taria.*

Liability of  
agent to third  
parties.

any claim he may have against the factor in answer to the demand of the principal' (*Rabone v. Williams*, 7 T. R. 360; *George v. Claggett*, 7 T. R. 359, 3 Ross's L. C. 160). But if the purchaser know or ought to know that the seller is not the principal, this doctrine does not hold,—as when the party selling is a mere broker, who has no custody of the goods (*Baring v. Corrie*, 2 B. & A. 137, 3 Ross's L. C. 162). An agent contracting as such for a known employer incurs no personal responsibility to third parties. He binds his principal, not himself; except in the case of masters of ships (see below, § 14). If, again, the agent contracts without naming his principal, he is himself the party *primâ facie* responsible, and though the other contracting party may, and generally does, elect the principal, he may, if he please, continue to look to the agent. And even if the agent at the time of the transaction states himself to be an agent only, his liability is the same as if he does not disclose the principal."—MOIR. It has been held in Scotland, contrary to the rule stated by Prof. Bell (Com. i. 194), that an agent in this country contracting for a disclosed foreign principal does not to any extent, apart from special bargain, guarantee the solvency of the principal. The question is one of evidence in all cases (*Millar v. Mitchell*, Feb. 17, 1860, 22 D. 833; see Smith's Merc. Law, 9th ed. 141-143).

(l) See *Patten v. Carruthers*, 1770, 2 Pat. Ap. 238; *Walker v. Somerville*, Dec. 13, 1837, 16 S. 217.

(m) The author in the Inst. l. c. does not confine the statement, that mandates are terminated by renunciation, to those which are gratuitous.

(n) And transactions entered into before the mandant's death could be known are valid (*Campbell v. Anderson*, Dec. 5, 1826, 5 S. 86, aff. May 1, 1829, 3 W. & S. 384; *Smout v. Ilberry*, 10 M. & W. 1). It was held in *Pollock v. Paterson*, Dec. 10, 1811, F.C., that the supervening insanity of the principal did not annul a general mandate, and though this case, which was not brought to a final judgment, has not been regarded as concluding the general point, there can be no doubt that the agent's contracts with persons truly ignorant of the principal's insanity are binding upon the latter (*Ivory's Ersk.* p. 202, 244; *Wink v. Mortimer*, March 8, 1849, 11 D. 995).

Insanity of  
principal.

datary, all of them, excepting precepts of *clare constat*, are declared to continue after the death either of the granter or grantee; 1693, c. 35.(o) Deeds which contain a clause or mandate for registration, are for the same reason made registrable after the death of either; 1693, c. 15; 1696, c. 39.

14. The favour of commerce has introduced a tacit mandate, by which masters of ships are empowered to contract in name of their exercitors or employers for repairs, ship provisions, and whatever else may be necessary for the ship or crew; so as to oblige, not themselves only, but their employers; l. 1, § 17, *de exerc. act.*, 14, l.(p) An exercitor

Tacit mandate  
of shipmaster.

(43-45)

(o) By 10 & 11 Vict. c. 48, § 15, re-enacted by 31 & 32 Vict. c. 101, § 103, writs or precepts of *clare constat* also remain in force, notwithstanding the death of the granter, as warrants for infefting the grantee at any time during his life.

(p) As the affairs of a ship are generally managed in a home port by the owner, or by an agent or ship's-husband (Bell's Pr. 449; Com. i. 503), the powers of the master are less extensive in such a port than they are abroad, *e.g.*, he cannot without special authority enter into a contract of affreightment, for extraordinary repairs, or for the loan of money (Bell's Com. i. 524). Abroad he has greater power, *e.g.*, to enter into a charter-party or receive goods for conveyance in a general ship. "He is the accredited agent of the owners in fitting-out, victualling, and manning the ship; in ordering necessities; and even in borrowing money for necessities,—although he may have been provided with money by the owners. He has power to hypothecate the ship for necessities; and his fault or neglect in performing his duties binds the owners to the extent of the value of the ship. He has no authority to *sell* either ship or cargo, unless under the pressure of the most extreme, absolute, and well-proved necessity" (Bell's Pr. 450; *The Gratitude*, 3 Rob. Adm. 240, Tudor's L. C. 30). In such questions all ports in Great Britain and Ireland are home ports (19 & 20 Vict. c. 60, § 18). It is certain, as stated in the text, that the master as well as the exercitor is liable on the contracts which he makes within his agency, contrary to the ordinary rule in contracts made through an agent; but it has been held that a creditor may sue either the master or the agent, but not both (*Priestly v. Fernie*, 5 H. & C. 977, 34 L. J. Ex. 172: see *Benn v. Porret*, March 11, 1868, 6 Macph. 577; Bell's Com. i. 509, 537). The master has no power to bind his owners by a bill, even for necessary furnishings, so as to disable them from pleading compensation against the furnishers (*London Joint Stock Bank v. Stewart & Co.*, July 15, 1859, 21 D. 1327; *Drain & Co. v. Scott*, Nov. 25, 1864, 3 Macph. 114). As to bottomry and *respondentia*, see Note G at end of this title.

Exercitors are bound by the contract of the master of the ship.

Institors by their contracts bind their employers.

(46)

Homologation;  
(47-50)

is he who employs a ship in trade, whether he be the owner, or only freights her from the owner.(q) Whoever has the actual charge of the ship is deemed the master, though he should have no commission from the exercitors, or should be substituted by the master in the direction of the ship, without their knowledge; l. 1, § 5, *ibid.* Exercitors are liable, whether the master has paid his own money to a merchant for necessaries, or has borrowed money to purchase them. The furnisher or lender must prove that the ship needed repairs, provisions, &c., to such an extent; but he is under no necessity to prove the application of the money or materials to the ship's use. If there are several exercitors, they are liable *singuli in solidum*.(r) In the same manner, the undertaker of any branch of trade, manufacture, or other land negotiation, is bound by the contract of the institors whom he sets over it, in so far as relates to the subjects of the *præpositura*: and though the institors be pupils, and so cannot bind themselves, the prepositor who, knowing their state, gave them a power to contract for him, stands obliged by their deeds; l. 7, § 2, *de inst. act.*, 14, 3.

15. Contracts and obligations in themselves imperfect receive strength by the contractor or his heirs doing any act thereafter which imports an approbation of them, and consequently supplies the want of an original legal consent. This is called homologation, and it takes place even in deeds intrinsically null, whether the nullity arises from the want of statutory solemnities (*Tailfer v. Hamilton*, Jan. 21, 1735, M.

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(q) This is the definition of Ulpian (l. 1, § 15, *ibid.*). The use of the word as meaning the master of the ship (Shaw's Bell's Com. 176; Bell's Pr. 231), and even the phrase "exercitorial power" (Bell's Pr. 450), as descriptive of the ship-master's agency, are therefore inaccurate. The *exercitor* or employer is distinguished from the master (*magister navis*); see Shee's Abbot on Shipping, p. 101, note (11th ed.); Bell's Com. i. 523. A mortgagee in possession is liable as exercitor for the necessary disbursements of the master (*Havilland, Routh, & Co. v. Thomson*, Dec. 24, 1864, 3 Macph. 313).

(r) That is, for contracts made by a ship's-husband or master acting for all the owners. But as co-owners are not partners, contracts for repairs or furnishings made with one of them do not bind the others (Inst. l. c.; Bell's Com. i. 519; Shee's Abbot on Shipping, 79 *et seq.*).

5657, 17,032), or from the incapacity of the granter; *Hume v. Hume*, June 28, 1671, M. 5688.(s) It cannot be inferred (1) by the act of a person who was not in the knowledge of the original deed; for one cannot approve what he is ignorant of. Hence one's subscribing as witness to a deed does not infer homologation; for witnesses are only called to attest the subscription without being told the contents; but a brother's signing as witness to his sister's marriage-contract, presumes his knowledge and homologation of the articles, from his near relation to the bride; *Davidson v. Davidson*, July 15, 1714, M. 5652. And yet an heir's witnessing a deed granted by his ancestor *in lecto*, does not infer homologation, let the relation be ever so near, because of the authority which the ancestor is presumed to have over the heir; *Dallas v. Paul*, Jan. 13, 1704, M. 5677.(t) (2) Homo-

in what cases  
is it excluded

(s) This was the case of a deed granted by a minor without the consent of his curators, which "induces a natural obligation," and is therefore capable of ratification. But "a deed signed by one naturally incapable of consent, as an idiot, or by one whom the law presumes to be such, as a pupil, infers no degree of obligation, and is truly no deed, but a kind of *non ens*, which cannot admit of homologation" (Inst. l. c.). This distinction has been questioned (More's Notes on Stair, p. 68; Dickson on Evidence, § 856); and it seems that the true view is that taken by Professor Bell (Com. i. 145), viz., that while a deed intrinsically null, such as that of a pupil, cannot be homologated so as to have effect from its date, it may, "if reduced to a precise and intelligible shape," be *adopted*, in which case "the binding effect has no retrospect" (*Gall v. Bird*, July 5, 1855, 17 D. 1027); and a forged acceptance of a bill of exchange may be adopted (*Warden v. British Linen Co.*, Feb. 13, 1863, 1 Macph. 402). But Bell (Com. l. c.) says, "Deeds intrinsically null cannot be adopted by the implied assent of one not originally a party to the deed;" and he observes, that in the Inst. l. c., Erskine, speaking less accurately than in the text, seems to confine homologation to the case of subsequent assent or approbation by the grantor of a deed, excluding cases in which it is effected by that of other persons having adverse interests. Adoption.

(t) The rule, that the person homologating must have full knowledge of the act or deed homologated, and the state of matters as affected by that deed, has most frequently been applied in regard to settlements affecting the rights of wives or children, which they are not held to have approbated if they have not been fully aware of their legal rights. Even ignorance of law is admitted, at least in the case of women and young persons, to exclude homologation (*Hope v. Dickson*, Dec. 17, 1833, 12 S.

logation has no place where the act or deed, which is pleaded as such, can be ascribed to any other cause; for an intention to come under an obligation is not presumed; hence charters, or precepts granted by superiors in obedience to a charge, infer no homologation. Marriage-contracts without witnesses have been found to be homologated by subsequent marriage; but, in truth, marriage, which is entered into frequently without any previous written contract, can, in no view, be deemed an approbation of special marriage articles.(u)

Quasi-con-  
tracts.

(51-53)

*Negotiorum  
gestio.*

16. Quasi-contracts are formed without explicit consent, by one of the parties doing something that by its nature either obliges him to the other party, or the other party to him. Under this class may be reckoned tutory (i. 7, § 12, &c.), the entry of an heir (iii. 8, § 26, &c.); *negotiorum gestio*, *indebiti solutio*, communion of goods between two or more common proprietors, and *mercium jactus levandæ navis causâ*. *Negotiorum gestio* forms those obligations which arise from the management of a person's affairs in his absence by another, without a mandate. As such manager acts without authority from the proprietor, he ought to be liable in exact diligence (l. 24, C. *de usur.*, 4, 32), unless he has, from friendship, interposed in affairs which admitted of no delay (l. 3, § 9, *de neg. gest.*, 3, 5);(x) and he is accountable for his intromissions, with interest.(y) On the other part, he is entitled to the recovery of his necessary disbursements on the subject, though, by misfortune, it should have perished afterwards (l. 10, § 1, *de neg. gest.*, 3, 5), and to be

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222; *Keith's Trs. v. Keith, &c.*, July 17, 1857, 19 D. 1040; *Douglas v. Douglas' Trs.*, June 28, 1859, 21 D. 1066; *Stewart v. Baillie*, Jan. 27, 1841, 3 D. 463; *Paterson v. Moncrieff*, May 15, 1866, 4 Macph. 706).

(u) "When a marriage has been solemnised on the faith of an antenuptial contract, it is not enough to allege defects in the solemnities of deeds in order to warrant a reduction; there must be actual forgery of the deed libelled to make the reduction relevant" (*per* Lord Gillies in *Falconer v. M'Leod*, Jan. 14, 1830, 8 S. 312; see *Wemyss v. Wemyss*, 1760, M. 9174; *Campbells v. M'Glashan*, June 5, 1812, F.C.).

(x) "In truth, the degree of diligence ever rises or falls according to the views of the *gestor* in undertaking the management, and the nature of the *gestio*" (Inst. l. c., q. v.).

(y) See *Fulton v. Fulton, &c.*, March 21, 1864, 2 Macph. 893.

relieved of the obligations in which he may have bound himself in consequence of the management.

17. *Indebiti solutio*, or the payment to one of what is not due to him, if made through any mistake, either of fact, or even of law (*Stirling v. E. of Lauderdale*, July 26, 1733, M. 2930), founds him who made the payments in an action against the receiver for repayment (*condictio indebiti*). This action does not lie—(1) If the sum paid was due *ex æquitate*, or by a natural obligation; for the obligation to restore is founded solely on equity. (2) If he who made the payment knew that nothing was due; for *qui consulto dat quod non debebat præsumitur donare*. Some lawyers add a third case—viz, If the sum was paid in consequence of a transaction. But where a sum is so paid there is no *indebitum*; the transaction itself creates a debt, though no prior debt had existed.(a)

*Indebiti solutio.*

(54)

18. Where two or more persons become common proprietors of the same subject, either by legacy, gift, or purchase, without the view of copartnership, an obligation is thereby created among the proprietors to communicate the profit and loss arising from the subject while it remains common. And the subject might by the Roman law be divided at the suit

Right of dividing common property.

(56, 58)

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(a) See *Carrick v. Carse*, 1778, M. 2931, Hailes 783. It has been held since that if a person pays money by mistake in law, he has in general no right to recover it (*Sinclair v. Wilson* and *M'Lellan*, Feb. 12, 1829, 7 S. 401, rev. Dec. 7, 1830, 4 W. & S. 398; *Dixons v. Monkland Canal Co.*, May 28, 1830, 8 S. 826, aff. Sept. 17, 1831, 5 W. & S. 445; *Brisbane v. Dacres*, 5 Taunt. 143). Error in law may, however, be a valid defence to an action for implement of an obligation (Bell's Pr. 534); it affords a ground of reduction of a discharge so far as granted without consideration in ignorance of the legal rights of the granter (*Dickson v. Halbert*, Feb. 17, 1854, 16 D. 586); and it would seem that in peculiar cases the Court will not hold itself bound by the observations in the House of Lords in the cases cited to refuse a *condictio indebiti* on the ground of error in law (*Dickson v. Halbert*, *cit.*; see note t, p. 349). If the person in error has failed to make due inquiry, and the means of correct knowledge were within his power, he cannot plead his own negligence (*Sinclair v. Wilson* and *M'Lellan*, *supra*; *Kelly v. Solari*, 9 M. & W. 54; *Townsend v. Crowdy*, 8 C. B. N. S. 477).

of any one of them, by the action *communi dividundo*.(b) No such action, in relation to common-lands,(c) was competent by our law, till 1695, c. 38, which authorised the division of common-lands before the Court of Session, at the suit of any having interest. This division, where the question is among the common proprietors, is to be governed, by the last clause in the statute, according to the valuation of their respective properties. But where the question turned between the proprietors and those that had servitudes upon the property, the rules mentioned in the preceding clause of the Act took place, by the former practice, according to the value of the interest of the several persons concerned. Hence, proprietors were allowed a *præcipuum* for their right of property over and above the share on account of their own or their tenant's possession by pasturage; *L. Polwarth, &c., v. E.*

(b) The author in the Inst. l. c., has been supposed to limit the action of division by the law of Scotland to the case of moveable subjects. But the action for division of heritable property held *pro indiviso* was very early introduced in Scotland in the form of the brieve of division (Stair, i. 7, 15; iv. 3, 11), which afterwards assumed the form of an action of division and sale, the pursuer being entitled to have the common subject sold when division is impossible (*Milligan v. Barnhill*, 1782, M. 2482, Hailes 896; *Brock v. Hamilton*, March 11, 1857, 19 D. 701, note). In the management of common property, when a change is proposed, the rule applies *melior est conditio prohibentis* (Bell's Pr. 1075).

Common  
Property,  
Common  
Interest, and  
Common-  
land,  
distinguished.

(c) Professor Bell (Pr. 1071) distinguishes three kinds of rights in common:—(1) Common Property,—where parties “have the same equal but undivided right, each being entitled to the joint use and enjoyment of the subject, and mutual consent being necessary in all acts of management or disposal; (2) Common Interest,—in which there is a mixture of property in one, restrained or qualified by an interest in another for the maintenance of the subject” (see above, ii. 1, 7, note); “and (3) Common-land,—in which a right, not of common property but only of common use, is conferred on several persons by the proprietor of subjects.” A right of common-land always has relation to pasture lands; and, though the distinction between it and the servitude of pasturage is somewhat vague, it practically differs from the latter, in respect that it is a right of limited property entitling to sue a division of common-land under the Act 1695, which a servitude does not (*Gall v. Greenhill*, May 31, 1810, F.C.). A servitude holder is neither entitled to demand, nor apparently bound to accept, a share of the common instead of his servitude (*Gordon v. Grant*, Nov. 12, 1850, 13 D. 1; Bell's Pr. 1096).

*Home, &c.*, 1724, M. 2462; but now the superface is only divided, without prejudice to the property. (See next section.)(d)

19. It has been doubted what is to be understood by *commonly*. The word, in proper speech, supposes two common proprietors at least; and yet in our law language, and in charters, it frequently signifies a heath or moor, though it should belong in property to one, if there has been a promiscuous possession upon it by pasturage; and the Act 1695 excepts commonities belonging in property to the King, or to royal boroughs.(e) The question, therefore, whether action lies upon the statute, where there is but one proprietor, at the suit of those who have servitudes upon it, has been variously decided. By the last judgment (*Stewart v. Mackenzie*, 1748, M. 2476) the Court, waving the general point, directed the surface of the common to be divided in that case according to the interest of the several parties in that surface, without prejudice to the right of property.(f) Another Act

What is understood to be commonly.

(57, 59, 60)

Division of run-rig lands.

(d) "The superior of lands held in feu, with clauses importing rights of *commonly*, has no right to a share of the common, or to any *precipuum*, in virtue of his title of superiority. Where *all* the lands feued stand on titles importing rights of commonly, and the superior has no lands retained in property which by the original titles and possession had the benefit of the commonly, the inference must be that the whole land of the commonly has been alienated to the feuars. Where the superior has still lands or property entitled to the benefit of the common, he must receive a share proportioned to the value of such lands. Where there are lands feued, but with clauses importing only rights of *servitude* in the common, the property *quoad hoc* remains with the superior, and a share must be allotted to him in the first instance corresponding to the valuations of the lands so held, with rights of servitude, besides what he gets on account of his own property-lands, leaving the rights of servitude to be satisfied by means of the portion so allotted."—*Per* Lord Moncrieff in *Lord Adv. v. Balfour*, Feb. 2, 1838, 16 S. 420. See *D. Buccleuch v. Erskine*, June 16, 1812, F.C. The superior has no right to a share in respect of feu-duties, which are included in the gross valuation of the feuars (*Lord Adv. v. Balfour, cit.*; see Bell's Pr. 1096).

(e) See *Hunter v. Miller*, Feb. 22, 1854, 16 D. 641.

(f) It is fixed that no action of division of commonly will lie either at the instance of, or against one who has the sole property in an alleged commonly (*Stewart v. Feuars of Tillicoultry*, 1739, M. 2470, 2472; *Bain v. Mags. of Wick*, March 4, 1834, 12 S. 522; Bell's Pr. 1093, 1094).

of the same year (c. 23) authorised the division of lands lying run-rig, and belonging to different proprietors, with the exception of borough and incorporated acres; the execution of which is committed to the judge-ordinary, or justices of the peace.

*Lex Rhodia de jactu.*

(55)

20. The throwing of goods overboard for lightening a ship in a storm, creates an obligation by the Rhodian law *de jactu*, which the Romans and other trading nations have made their own; whereby the owners of the ship and goods saved(*g*) are obliged to contribute for the relief of those whose goods were thrown overboard,(*h*) so that all may bear a proportional loss of the goods ejected for the common safety. In this contribution the goods ejected are valued at prime cost, and the ships and goods saved at the price they may give at the next port (l. 2, § 4, *de leg. Rhod.*, 14, 2);(*i*) but the ship's provisions suffer no estimation (l. 3, § 2, *eod. t.*). A master who has cut his mast, or parted with his anchor to save the ship, is entitled to this relief (l. 3, *eod. t.*); but if he has lost them by the storm, the loss falls only on the

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(*g*) The subjects of contribution are the ship, the goods, and the freight. The practice is to take an account of the articles which are to contribute, in which the property sacrificed is included, otherwise its owners would receive its value without paying towards the loss. Another account is made of the losses to be replaced, and the average is then adjusted by the brokers (Smith's Merc. Law, 9th ed. 325).

(*h*) The principle is not confined to a jettison of goods, but "all loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested;" *Birkley v. Presgrave*, 1 East. 220, Tudor's L. C. 83. See *Stewart v. West India, &c., Steamship Co.*, 42 L. J., Q. B. 84, 191.

(*i*) The rule of the Roman law is not now observed in this country. If the ship reaches her destination, and the average is adjusted there, the goods sacrificed are valued at the market-value there, after deducting freight and other charges, because the owner of the goods sacrificed ought to be put on the same footing with those whose goods have been saved through his loss. If the ship puts back to the port of lading, and the average is there adjusted, the invoice price is adopted as the valuation of all; if they are stopped short at any other port, the valuation of all is made according to the actual value there (Shee's Abbot on Shipping, 550; Bell's Pr. 441; see last sentence of this section).

ship and freight.(j) If the ejection does not save the ship, the goods preserved from the shipwreck are not liable in contribution.(k) By the latter laws of Wisby (art. 20), ejection may be lawfully made, if the master and a third part of the mariners judge that measure necessary, though the owners of the goods should oppose it;(l) and the goods ejected are to be valued at the price that the goods of the same sort which are saved shall be afterwards sold for.(m)

21. There are certain obligations which cannot subsist by themselves, but are accessions to, or make a part of, other obligations. Of this sort are *fidejussion*, and the obligation to pay interest. Cautionry, or *fidejussion*, is that obligation by which one becomes engaged as security for another, that he shall either pay a sum, or perform a deed.

Accessory obligations.  
(60)

Cautionry,

22. A cautioner for a sum of money may be bound,(n) for a sum of money.

(j) It has even been held contrary to the words, but in conformity with the spirit of the civil law, that the intentional stranding of a ship, in order to escape an enemy or to avoid shipwreck on a more dangerous spot, is an average loss (*Colombian Insur. Co. v. Ashby*, 13 Pet. 331, Tudor's L. C. 97); but if the vessel has been driven ashore, only the expense of discharging the cargo constitutes general average (*Job v. Langton*, 6 E. & B. 779; Bell's Com. i. 589).

(61, 62)

(k) But if the ship survive the storm of danger in which the goods are jettisoned, and afterwards perish from some other danger, any goods which are saved must contribute to the original loss, without which even the diminished value would have no existence (Bell's Com. i. 586 Shee's Abbot on Shipping, 548).

(l) But Lord Kenyon says:—"The rule of consulting the crew is rather founded in prudence, in order to avoid dispute, than in necessity, as it may often happen that the danger is too urgent to admit of any such deliberation" (*Birkley v. Presgrave, cit.*; Abbot 526).

(m) See above, note (k).

(n) "The engagement as cautioner must, in the general case, be constituted by probative writing. But an informal writing, if followed by *rei interventus*, as when an advance has been made on the face of it, is valid. If the obligation be neither probative, nor a document *in re mercatoria*, nor followed by *rei interventus*, it is null, though the party offer to prove the genuineness of the subscription by oath of party; or although the fact be admitted on the record (*Crichton v. Syme*, 1772, M. 17,047; *Edmonstone v. Lang*, June 23, 1786, M. 17,037). An exception was admitted, and parole proof considered competent, where the cautionary obligation was an integral part of a contract between the creditor and principal

Constitution and proof of cautionry.

A simple cautioner has the benefit of discussion.

either simply as cautioner for the principal debtor, or conjunctly and severally for and with the principal debtor. The first has, both by the Roman law (Nov. 4, c. 1) and by our customs, the *beneficium ordinis*, or of discussion,(o) by

debtor, which in itself might be proved by parole evidence. This was done away with, and all verbal cautionry put an end to, by § 6 of the Mercantile Law Amendment Act, which requires 'all guarantees, securities, or cautionary obligations made or granted by any person for any other person, to be in writing, and subscribed by the person undertaking such guarantee, security, or cautionary obligation, or by some person duly authorised by him.' Cautionary obligations, entered into conditionally, e.g., on the condition that other persons are to be bound as co-cautioners, so as to divide the responsibility and the loss, are not complete till all have signed : *Paterson v. Bonar*, March 9, 1844, 6 D. 987, where one of several intended obligants not having subscribed a bond to a bank for a cash-credit, and the bank having made advances on the party in whose favour the credit was constituted, the other obligants who had subscribed were held not to be bound. I find it difficult to reconcile this decision with that of *M'Donald v. Stewart*, July 5, 1810, F.C., and *Blair v. Taylor*, July 1, 1836, 14 S. 1069. But the result appears to be, that it must be made perfectly clear that the obligant intended to make it a condition of his obligation that a given number of others were to be bound along with him, and that condition will not be inferred merely from his putting his name to a bond which contains the names of others as contemplated co-obligants along with him. It is his duty to see that their signatures are appended before he allows the bond to pass into the hands of the creditor."—MOIR. See *Scottish Prov. Assur. Co. v. Pringle, &c.*, Jan. 28, 1858, 20 D. 463 ; *Craig v. Paton*, Dec. 13, 1865, 4 Macph. 192. Bonds of judicial caution are different ; and thus, when one of the signatures in a bond of caution in a suspension is forged, the other cautioners remain bound to the charger, who undertakes no duty and incurs no risk in regard to the preparation of the deed and the validity of its execution (*Simpson v. Fleming*, Feb. 3, 1860, 22 D. 679).

(o) In order to have the benefit of discussion, the cautioner must now expressly stipulate in the deed that the creditor shall be bound to discuss the principal debtor before proceeding against him ; 19 & 20 Vict. c. 60, § 8. But this provision of the Mercantile Law Amendment Act applies only to obligations for payment of debt, not to obligations *ad factum præstandum*. Apart from this statute, bills and notes, even where signed by a party "as cautioner" (*M'Dougall v. Foyer*, Feb. 13, 1810, F.C.), judicial bonds of caution (*Dickie v. Thomson*, 1743, M. 2110), and direct guarantees, such as are usual in mercantile dealings (*Blackwood v. Forbes*, March 10, 1848, 10 D. 920), imply an obligation to pay the debt without benefit of discussion.

which the creditor is obliged to discuss the proper debtor before he can insist for payment against the cautioner. By discussing is not barely meant the making a demand of the debt. The person of the debtor must be discussed by denunciation, and by registering the horning;<sup>(p)</sup> his moveable estate by poinding, or arrestment and forthcoming; and his heritage by adjudication; *Brisbane v. Monteith*, July 24, 1662, M. 3588.<sup>(q)</sup> Where one is bound as full debtor with and for the principal, or conjunctly and severally with him, the two obligants are bound equally in the same obligation, each *in solidum*; and consequently, the cautioner, though he is but an accessory, may be sued for the whole, without either discussing or even citing the principal debtor. Cautioners for performance of facts by another, or for the faithful discharge of an office, *e.g.*, for factors, tutors, &c., cannot, by the nature of their engagement, be bound conjunctly and severally with the principal obligant; because the fact to which the principal is bound cannot possibly be performed by any other. In such engagements, therefore, the failure must be previously constituted against the proper debtor, before action can be brought against the cautioner, for making up the loss of the party suffering.<sup>(r)</sup>

Cautioner bound conjunctly and severally.

Cautioner for performance of facts,

is in every case entitled to discussion.

(p) Under the Personal Diligence Act, 1 & 2 Vict. c. 118, registration of an expired charge is sufficient discussion of the person of the debtor.

(q) It seems that sequestration under the Bankruptcy Statute is sufficient discussion (Bell's Pr. 253); and that the creditor may proceed at once against the cautioner when the principal debtor is furth of the kingdom, and has no effects in it (*Elams v. Fisher*, 1757, M. 2110).

(r) "In regard to such cautionary obligations, not only must there be the utmost fairness in the outset in communicating all such information as would have probably affected the mind of the intending cautioner (*Smith v. Bank of Scotland*, Jan. 14, 1829, 7 S. 244, 3 Dow 272; *Stein's Assignees v. Bruntton*, Feb. 12, 1833, 11 S. 373); but, after the obligation is entered into, there are still duties of superintendence imposed on the creditor, the neglect of which will liberate the cautioner, if they are such as are expressly stipulated in the agreement (*Forbes v. Welsh*, June 10, 1829, 7 S. 732). Even where there is no infringement of an express stipulation, gross neglect on the part of the creditor, or knowledge on his part that irregularities are committed, will be sufficient to liberate the cautioner (*Thistle Friendly Society of Aberdeen v. Garden*, June 17, 1834, 12

Duties of creditors in Cautionary Obligations for Conduct of Officials.

*Beneficium  
divisionis  
among co-  
cautioners.*

(63)

23. In the case of two or more cautioners, each of them by the Roman law pronounced the obligatory words by himself, and so became bound to the creditor *in solidum*, until the *beneficium divisionis* was introduced, by which cautioners were entitled to insist that the obligation might be divided among all of them *pro rata*; § 4, *Inst. de fidejuss.*(3, 20.) By our law all the co-cautioners are bound in the same writing; so that there is no place for this benefit. For when they become obliged conjunctly and severally, the plain intention of parties is that the obligation should not be divided; and where they are bound simply as cautioners, each co-cautioner is, by the genuine nature of such obligation, without any privilege, liable only for his own proportion, while the other obligants are solvent, except where the obligation is in itself indivisible.

*Fidejussio is  
an obligation  
merely natural.*

(64)

24. Fidejussio may be interposed to an obligation merely natural, in which the cautioner is effectually bound, though the principal debtor should get free. Thus, a cautioner in a bond not legally attested as to the principal debtor, lies under a proper engagement; because the statutory nullity, on which the principal escapes, does not take away the natural obligation; (*Hepburn*) *Nimmo v. Brown*, Feb. 2, 1700, M. 2076. But cautionry cannot subsist without some obligation to which it is accessory.(s)

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S. 745). But the case must be brought up to one of gross negligence; or of positive sanction by the principal to the improper actings of the officer (*M'Taggart's Reprs. v. Watson*, Jan. 24, 1834, 12 S. 332, rev. April 16, 1835, 1 S. & M'L. 553).”—MOIR. In cautionary obligations for bank-agents, a peculiar degree of strictness and care in superintendence is required on the part of the bank, on account of the great powers intrusted to such agents, and the great hazard incurred by the cautioner in the event of their fraud or misconduct (see *Smith v. Bank of Scotland*, *supra*; *Thomson v. Bank of Scotland*, Jan. 29, 1822, 1 S. 275, rev. June 11, 1824, 2 S. App. 317; *Leith Bank v. Bell*, May 12, 1830, 8 S. 721, aff. Oct. 1, 1831, 5 W. & S. 703). Any material change in the nature of the employee's duties and responsibilities, not communicated to the cautioner, liberates him (*Bonar v. M'Donald*, July 17, 1847, 9 D. 1537, aff. Aug. 9, 1850, 7 Bell 379).

(s) A cautioner for a married woman, or a minor acting without his curators, is bound; but not a cautioner for a debtor who has not subscribed his principal obligation at all (*Inst. l. c.*).

25. The cautioner, who binds himself at the desire of the principal debtor, has an *actio mandati*, or of relief against him, for recovering the principal and interest paid by himself to the creditor, and for damages; which action lies *de jure*, though the creditor should not assign to him on payment. Under damage is not comprehended the loss sustained by the cautioner through his own fault, *e.g.*, in suspending the debt without good grounds, or in allowing diligence to proceed upon it against his estate. As relief against the debtor is implied in fidejussory obligations, the cautioner, where such a relief is cut off, is no longer bound. Hence the defence of prescription frees the cautioner, as well as the principal debtor; *Doul v. Home*, Dec. 16, 1695, M. 2077.(t) Thus, likewise, a cautioner is not bound, though the creditor should offer to prove by his oath that he heard the debtor acknowledge the debt; because, as such oath could not prove against the debtor, the cautioner, if he were obliged to depose, would pay without relief; *Herdman v. Borthwick*, 1699, M. 2078.

Cautioners have an *actio mandati* against the debtor.

(65, 66)

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(t) As to prescription, see below, t. 7, § 9. Besides prescription and their natural solution by payment or performance, cautionary obligations are extinguished in the following ways:—“(1) By the discharge of the principal debtor by the creditor without the consent of the cautioner. But when the cautioner is himself insolvent, or has been called upon to pay and has failed to do so, the creditor is entitled to rank on the estate of the principal, and take such composition as it will afford, reserving his right as against the cautioner. (2) It was at one time held that if the creditor ranked in a sequestration, accepted a composition, and agreed to the discharge of the principal debtor without the express assent of the cautioner, this extinguished the cautionary obligation. But it was settled otherwise by *Whitelaw and Kirk v. Steins*, May 20, 1814, F.C. The matter is now expressly regulated on this footing by 19 & 20 Vict. c. 79, § 56. (3) Discharge of a cautioner without the co-cautioner's consent was formerly held to operate a discharge of the remaining cautioners to the extent of the share of the debt which would have fallen on that cautioner. But the Mercantile Law Amendment Act, § 9, provides that where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation shall be deemed and taken to be a discharge granted to all the cautioners. (4) The renunciation by the creditor of any security held by him over the debtor's estate is also a discharge of the cautioner to the extent of the

Extinction of Cautionary Obligations.

In what cases  
a cautioner has  
no relief  
against the  
debtor.

(67, 65)

At what period  
relief is  
competent.

Mutual relief  
among co-  
cautioners.

(68, 69)

26. But (1) where the cautioner is interposed to an obligation merely natural, the relief is restricted to the sums that have really turned to the debtor's profit. (2) A cautioner who pays without citing the debtor loses his relief, in so far as the debtor had a relevant defence against the debt, in whole or in part; *Maxwell v. E. of Nithsdale*, Dec. 19, 1632, M. 2115.(u) Relief is not competent to the cautioner till he either pays the debt or is distressed for it; except (1) where the debtor is expressly bound to deliver to the cautioner his obligation cancelled against a day certain, and has failed; or (2) where the debtor is *vergens ad inopiam*; in which case the cautioner may by proper diligence secure the debtor's funds for his own relief, even before payment or distress.

27. Mutual relief was not competent among the cautioners themselves by the Roman law; for their obligations being separate, and having no mutual connection, payment made by any one of them to the creditor extinguished the obligation, unless the cautioner who paid had got a cession or assignment from the creditor, which he was entitled to demand by the *beneficium cedendarum actionum*. But by our law a right of relief is competent *de jure* to the cautioner

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value of such security. (5) discharge of the debtor from actual imprisonment by the creditor who incarcerated him discharges the cautioner, because it is impossible to estimate the effect which continued imprisonment might have had on the debtor or the debtor's friends (*Ersk.* iii. 3, 66). (6) Gross neglect on the part of the creditor frees the cautioner. But this neglect must be of some known rule; as in the case of bills of exchange, in the negotiation of which the law prescribes a particular course; or it must be so gross as approaches to dole. Strict diligence against the debtor as soon as the period of payment arrives is not required; but if the creditor by positive agreement gives him time without the assent of the cautioner, the latter is liberated (*Bell's Pr.* 262). The doctrine of giving time appears inapplicable to cautionary obligations for the discharge of an office, or of a continuous course of transactions under a cash-credit bond."—*MOIR*. See § 22, note (q). A change in the partners of a firm for which a guarantee has been granted, relieves the cautioner unless the contrary has been stipulated (19 & 20 Vict. c. 60, § 7).

(u) Further, a cautioner is barred from claiming relief where the debt has truly been contracted or applied for his own behoof (*Erskine v. Cormack*, July 5, 1842, 4 D. 1478).

who pays against his co-cautioners, (a) without either assignation, (b) or even any clause of mutual relief in the bond, unless where the cautioner appears to have renounced it.

(a) "In demanding that relief from his co-cautioner, he must communicate the benefit of any ease or deduction which he may receive in paying the debt, and the benefit of any security which he may hold over the estate of the principal. But the general rule does not apply where each cautioner is bound in payment of a separate and specific sum; *Lawrie v. Stewart*, June 6, 1823, 2 S. 368. In the general case, however, there is no such separation of liability. But a question arises, whether in such a case a cautioner can be compelled to communicate to a co-cautioner the benefit of a separate security which he holds, when his doing so would prejudice himself. Mr. Bell (Com. i. 349) holds that where one 'cautioner alone has stipulated for the security, and where this difference has been openly made between cautioners at first, and with the knowledge of each other, it is probable that the Court would not communicate the security.' So, where a cautioner holds a collateral security applicable to other debts also, he is not bound to renounce the benefit of his security, so far as it is applicable to those debts (*Campbell v. Campbell*, 1775, M. 2132). But where, the cautioners being originally on the same footing, one of them *subsequently* gets a security in his favour from the debtor, the principle which rules the case is that the cautioner is bound to act, and is presumed to have acted, for the general benefit, so that what is given for the relief of one is to be communicated for the benefit of all (*Milligan v. Glen*, May 20, 1802, F.C.). No case, however, exists in which a co-cautioner, who has obtained a security over the estate of a third party, has been held liable to communicate the benefit of it to a co-cautioner. All the decided cases have reference to securities obtained over the proper estate of the principal debtor, and there seem to be no equitable grounds on which a party could be compelled so to communicate. The co-cautioner, in the event of the bankruptcy of another co-cautioner, cannot rank on his estate for more than his due proportion of the debt (*Maxwell's Crs. v. Heron*, Feb. 8, 1792, M. 2136, rev. June 11, 1794, 3 Pat. 350)." —MOIR. This decision appears to overrule the doctrine laid down, on the authority of *Smeiton v. Kinninmond*, 1684, M. 14,641, by Erskine, Inst. iii. 3, 74, *fin.*

(b) Although a cautioner may operate relief without an assignation, the creditor is yet bound to grant an assignation to any person paying the debt (*Erskine v. Manderson*, 1780, M. 3355; *M'Gillivray v. M'Arthur*, June 10, 1826, 4 S. 697; *Gilmour v. Finnie*, Dec. 11, 1832, 11 S. 193,—correcting Ersk. Inst. iii. 3, 68). But the creditor is bound to grant such an assignation only to one who pays the whole debt; and there is no exception to this rule, even where he ranks for a dividend on the estate of a bankrupt surety (*Ewart v. Latta*, June 10, 1863, 1 Macph. 905, rev. May 5, 1865, 3 Macph. H. L. 36, 4 Macq. 983).

Communication of cases and securities.

Creditor must grant assignation to one paying his debt.

Relief competent to cautioners in a bond of corroboration.

In consequence of this implied relief, a creditor, if he shall grant a discharge to any one of the cautioners, must, in demanding the debt from the others, deduct that part as to which he has cut off their relief by that discharge.(c) Where a cautioner in a bond signs a bond of corroboration as a principal obligant with the proper debtor, and with them a new cautioner, the cautioner in the new bond is entitled to a total relief against the first cautioner, at whose desire he is presumed to be bound ; *Mirrie v. Pollock*, July 10, 1745, M. 2125, Elch. "Cautioner," 16. And this total relief against the first cautioner seems equitable, though he should not be a party to the bond of corroboration ; for a corroborative security, in which he has no concern, ought not to advantage him, by throwing part of his cautionary obligation upon another ; *Clarkson v. Edgar*, 1703, M. 14,645 ; *Brock v. L. Bargany*, 1705, M. 14,648.(d)

Judicial cautionry.

(71-73)

Cautioners in a suspension.

28. Cautionry is also judicial, as in a suspension. Cautioners of this kind got free if either the charger or suspender died before discussing the suspension, till Act S., Jan. 29, 1650. And even after that Act their obligation ceased if the decree suspended had been turned into a libel, i.e., sustained only as a libel through any informality ; though the suspender should have been at last condemned in payment. This was altered by Act S., Dec. 27, 1709 ;(e) but

(c) See above, § 25, note (t).

(d) The last sentence is not quite accurate, the authorities cited having been overruled. If a new cautioner is introduced at the desire of the debtor, and not of the former cautioner, he has only a rateable relief as if he had been a party to the original obligation. If he be introduced at the desire of the former cautioner, or to relieve him from an impending demand, he is entitled to total relief against him. In the absence of facts and circumstances leading to a contrary inference, he is presumed to have interposed for the principal debtor, with the same right of relief as the original cautioner (*Smiton v. Miller*, 1792, M. 2138, 1 Bell's Com. 352, 3 Ross's L. C. 42 ; *Lennox v. Campbell*, May 18, 1815, F.C. ; *Walker v. Inglis*, May 5, 1827, 5 S. 726, aff. March 3, 1830, 4 W. & S. 40 ; *Thorburn v. Howie*, June 18, 1863, 1 Macph. 1169 ; Bell's Pr. 272. (See further, as to Bonds of Caution for Cash Credits, Letters of Recommendation, and Mercantile Guarantees, Note E at the end of this title).

(e) The cautioner in a suspension is not liberated by the circumstance

it is sufficient at this day to loose the cautioner, that when he became bound the suspender had good reason to suspend, e.g., if the charger had at that period no title, or had not then performed his part, though these grounds of suspension should be afterwards taken off.(g) The clerk to the bills, whose duty it is to receive none but solvent cautioners, usually demanded for his security an attestation by one of a known character of the solvency of the cautioner offered. These attesters must, by the last quoted Act of Sederunt, bind themselves as cautioners for the cautioner in the suspension, and so are liable *subsidiarie*, in their order, after he is discussed. In all maritime causes, where the parties are frequently foreigners, the defender must give caution *judicio sisti et judicatum solvi*.(h) Such cautioner gets free by the death of the defender before sentence (*Hodge v. Story*, Jan. 20, 1680, M. 2034); but he continues bound though the cause should be carried from the Admiral to the Court of Session; *Stewart v. Geddes*, Nov. 16, 1636, M. 2033. This sort of caution is only to be exacted in causes strictly maritime; *Rowand v. Freeman*, Jan. 9, 1755, M. 2043.(i)

Cautioners  
*judicio sisti et  
judicatum  
solvi.*

29. It happens frequently that a creditor takes two or more obligants bound to him, all as principal debtors, with-

*Correi debendi.*

(74)

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of the decree under suspension being turned into a libel (*Herbertson v. Rattray*, 1793, M. 2157).

(g) *M'Gowan v. Marshall*, 1784, M. 2155.

(h) Abolished by 13 & 14 Vict. c. 36, § 24.

(i) Caution in advocations was subject to the same rules as caution in suspensions; but in the appeal which has been substituted for the former process of advocacy no caution is required of the appellant (31 & 32 Vict. c. 100, § 65). The other principal kinds of judicial caution are—caution *judicio sisti*, i.e., to abide judgment within the jurisdiction of the Court, which is applicable to debtors *in meditatione fugæ* (*supra*, i. 2, 12; Bell's Com. i. 380 *et seq.*); caution by bond of presentation, whereby the cautioner undertakes to present a debtor, on the eve of being incarcerated for his debt, at a time and place mentioned, under the pain of paying the debt (Bell's Com. i. 385); caution in loosing arrestments, whereby the cautioner is bound to produce the goods or pay the arrester's debt to the extent of the value of the goods (*infra*, t. 6, § 7; Bell's Com. ii. 69); caution for judicial factors, which extends to their whole intromissions and management (12 & 13 Vict. c. 51; Fraser, Par. & Ch., 2d ed. 515 *et seq.*).

out fidejussion. Where they are so bound for the performance of facts that are in themselves indivisible, they are liable each for the whole, or *singuli in solidum*; *Groat v. Sutherland*, 1672, M. 14,631.(k) But if the obligation be for a sum of money, they are only liable *pro rata*; unless (1) where they are in express words bound conjunctly and severally, or (2) in the case of bills or promissory notes; *Elliot*, Nov. 13, 1746, n.r.(l) One of several obligants of this sort, who pays the whole debt or fulfils the obligation, is entitled to a proportional relief against the rest, in such manner that the loss must in every case fall equally upon all the solvent obligants.(m)

Interest of  
money.

(75, 76)

30. Obligations for sums of money are frequently accompanied with an obligation for the annual rent or interest thereof. Interest (*usura*) is the profit due by the debtor of a sum of money to the creditor for the use of it. The canon law considered the taking of interest as unlawful, because money yields no natural fruits; but the law of Moses allowed it to be exacted from strangers (Lev. xxv. 36; Deut. xxiii. 19, 20); and all the reformed nations of Europe have found it necessary, after the example of the Romans, to authorise it at certain rates fixed by statute. Soon after the Reformation our legal interest was fixed at the rate of 10 per cent. per annum (1587, c. 52); from which time it has been gradually reduced, till at last, by 12 Ann. stat. ii. c. 16, it was brought to 5 per cent., and has continued at that rate ever since.(n)

Rates of  
interest.

Interest due by  
law ;

(77, 78)

interest upon  
bills ;

31. Interest is due either by law or by paction. It is due by law, either from the force of statute (under which may be included Acts of Sederunt), or from the nature of the transaction. Bills of Exchange (1681, c. 20) and inland

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(k) Apparently they continue so, notwithstanding what is said in the Inst. l. c., even when, by the failure to perform, the obligation resolves into a claim of damages (see *Darlington v. Gray*, Dec. 6, 1836, 15 S. 197).

(l) *M'Dougal v. Foyer*, Feb. 13, 1810, F.C. ; 1 Bell's Com. 399.

(m) See above, pp. 308, 358, Note A, and §§ 25, 27.

(n) There is now no limit to the rate of interest which may be stipulated.

bills (1696, c. 36),<sup>(o)</sup> though they should not be protested (*Baynton v. Swinton*, 1718, M. 474), carry interest from their date in case of not-acceptance; or from the day of their falling due in case of acceptance and not-payment. Where a bill is accepted which bears no term of payment, or which is payable on demand, no interest is due till demand be made of the sum, the legal voucher of which is a notarial protest.<sup>(p)</sup> By 1621, c. 20, interest is due by a debtor after denunciation for all the sums contained in the diligence, even for that part which is made up of interest.<sup>(q)</sup> Sums paid by cautioners on distress carry interest, by Act. S., Feb. 1, 1610 (see Spots. Pr. 34), not only as to the principal sum in the obligation, but as to the interest paid by the cautioner. It was found to be sufficient distress that the obligation was registered, though no charge of horning had been used thereupon against the cautioner; *Wauchton v. L. Innerwick*, Jan. 24, 1627, M. 519.<sup>(r)</sup> Factors named by the Court of Session are liable for interest by a special Act of Sederunt; see ii. 12, § 23.

upon denun-  
ciation;

upon sums  
paid by cau-  
tioners dis-  
tressed.

Interest due  
by factors.

32. It arises *ex lege*, or from the nature of the transaction, that a purchaser in a sale is liable in interest for the price of the lands bought from the term of his entry, though the price should be arrested in his hands (*Dury v. Ramsay*, Feb. 17, 1624, M. 542); or though the seller should not be able to deliver to him a sufficient progress or title to the lands (*L. Balnagown v. Mackenzie*, Jan. 28, 1663, M. 545); for no purchaser can in equity enjoy the fruits of the lands while at the same time he retains the interest of the price; but lawful consignment of the price made by a purchaser, upon the refusal of the persons having right to receive it,

Interest of the  
price of lands.

(79, 80)

(o) And promissory notes (12 Geo. III. c. 72).

(p) Or citation in an action (*Moncrieff v. Moncrieff*, 1752, M. 478, 481).

(q) *Findlay v. Donaldson's Trs.*, Feb. 10, 1849, 11 D. 569. Adjudication, as being a process of execution, has also the effect of accumulating principal and interest, and so also has a decree of sale (19 & 20 Vict. c. 91, § 4).

(r) In practice, cautioners adjudge for accumulated principal and interest, with interest from the day of payment, whether there has been distress or not (Inst. l. c.; Bell's Com. i. 652).

stops the currency of interest. Where one intermeddles with money belonging to another which carries interest, he ought to restore it *com omni obventionē et causā*, and is therefore liable in the interest of it, as being truly an accessory of the subject itself; *Irvine v. Gordon*, Dec. 22, 1710, M. 553; *Erskine v. E. Lauderdale*, Feb. 18, 1736, M. 554. It is also from the nature of the transaction that interest is in certain cases allowed to merchants or others, in name of damages (*Aubray v. Ross' Exrs.*, Jan. 13, 1737, M. 528); or *ex morā*; *Campbell v. Rose*, 1752, M. 516.(s) And the obligation upon tutors to employ the *nummi pupillares* upon interest after certain periods (i. 7, § 12) may be derived from the same source.

Interest due to merchants, minors, or others, *nomine damni*.

Interest by express paction;

(81, 82)

33. Interest is due by express paction where there is a clause in a bond or obligation by which money is made to carry interest. An obligation is not lawful where it is agreed on that the yearly interest of the sum lent, if it should not be paid punctually as it falls due, shall be accumulated into a principal sum bearing interest; but an obligation may be lawfully granted, not only for the sum truly lent, but for the interest to the day at which the obligation is made payable (1621, c. 28), whereby the intermediate interest is accumulated into a principal sum from the term of payment.(t)

(s) "The doctrine (of implied contract to pay interest) is gradually extending, so as to recognise a claim of interest in all cases of loan and debt in which one enjoys the use of money belonging to another" (Bell's Com. i. 648). The rule and practice in regard to interest in modern times are quite different from what they were formerly; so much so, that non-liability for interest may be held exceptional from the general rule that interest is payable on debts duly vouched from the term of payment (*per* Lord Cowan in *Dalmahoy and Wood v. Mags. of Brechin*, Jan. 5, 1859, 21 D. 210; *Cunninghame v. Boswell*, May 29, 1868, 6 Macph. 890). In cases of breach of contract or *mora* in payment, interest is allowed without any inquiry into actual damage, and all losses are estimated according to the legal rate of interest (Bell's Com. i. 649).

Compound interest.

(t) The Act 1621, c. 28, is one of those repealed by 17 & 18 Vict. c. 90, and probably it would not now be held illegal to accumulate interest by anticipation. In general, it is still true that interest does not *ipso jure* bear interest. Compound interest with annual rests is allowed only where there is a fixed usage in commercial dealings or other transactions (Bell's Pr. 32; Com. i. 651, and cases cited; *Findlay, Bannatyne, & Co. v. Donald-*

Interest may be also due by implied paction. Thus, where interest upon a debt is, by a letter, promised for time past, such promise implies a paction for interest as long as the debt remains unpaid; thus, also, the use of payment of interest presumes a paction (*Carnegie v. Durham*, 1676, M. 484); and when interest is expressed for one term it is presumed to be bargained for till payment; *Hume v. Seaton*, Jan. 13, 1669, M. 486.

34. The subject-matter of all obligations consists either of things or of facts. Things exempted from commerce cannot be the subject of obligation; ii. 1, 2 *et seq.* One cannot be obliged to the performance of a fact naturally impossible; nor of a fact in itself immoral; for that is also, in the judgment of law, impossible; l. 15, *de cond. inst.* (28, 7). Bargains relating to the succession of a person yet alive were reprobated by the Roman law as *contra bonos mores* (l. 61, *de V. O.*, 45, 1); but are allowed by our practice; *Ragg v. Brown*, July 29, 1708, M. 9492. Since impossible obligations are null, no penalty or damage can be incurred for non-performance; but it is otherwise if the fact be in itself possible, though not in the debtor's power; in which case the rule obtains, *Locum facti impræstabilis subit damnum et interesse.*(u)

35. An obligation, to which a condition is adjoined either naturally or morally impossible, is in the general case null; for the parties are presumed not to have been serious. But such obligation is valid, and the condition thereof held *pro non scriptâ*—(1) in testaments; (2) in obligations to the performance of which the granter lies under a natural tie;

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*son*, July 29, 1864, 2 Macph., H. L., 86; *Douglas v. Douglas's Trs.*, June 7, 1867, 5 Macph. 827; or where a party is bound by his duty to lay out and accumulate the funds under his management, as in the case of judicial factors, tutors-at-law, &c., under the Pupils Protection Act, 12 & 13 Vict. c. 51, §§ 4, 5, 37, private trustees and testamentary tutors, as well as factors, law-agents, and bankers, whose accounts are annually settled (*Montgomerie v. Wauchope*, June 4, 1822, F.C., 1 S. 435; *Campbell v. Keith*, July 9, 1840, 2 D. 1367; *Wellwood's Trs. v. Boswell*, Dec. 17, 1856, 19 D. 187; Bell's Pr. l. c).

(u) As to illegal and immoral contracts, see Note A, p. 307.

or unfavourable.

Potestative conditions.

Implement in contracts must be mutual.

Donation ;  
(88, 89, 90)

when revocable.

as in bonds of provision to a child.(x) Where an obligation is granted under a condition lawful but unfavourable, *e.g.*, that the creditor shall not marry without the consent of certain friends, no more weight is given to the condition than the judge thinks reasonable, whether the obligant lay under a natural tie to oblige himself (*Pringle v. Pringle*, July 20, 1688, M. 2972), or not ; *Ford v. Ford*, March 1682, M. 2970. A condition which is some degree in the power of the creditor himself is held as fulfilled if he has done all he could to fulfil it ; l. 11, *de cond. inst.* (28, 7). Implement or performance cannot be demanded in a mutual contract by that party who himself declines or cannot fulfil the counterpart. Thus, a husband becoming bankrupt cannot demand, nor can any of his creditors affect, the wife's tocher, till her provisions contained in the marriage articles be secured to her ; *Cred. of Watson v. Cameron*, June 9, 1738, M. 9196, Elch. "Mut. Contr." 11.(y)

36. Donation, as long as the subject is not delivered to the donee, may be justly ranked among obligations ; and it is that obligation which arises from the mere goodwill and liberality of the granter. Donations imply no warrandice but from the future facts of the donor. They are hardly revocable by our law for ingratitude, though it should be of the grossest kind.(z) Those betwixt man and wife are revocable by the donor, even after the death of the donee ; but remuneratory grants, not being truly donations, cannot be

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(x) An example of a condition *contra bonos mores* is furnished in *Fraser v. Rose*, July 18, 1849, 11 D. 1466, where a father left a legacy to his daughter on condition that she should not reside with her mother, who was of irreproachable character.

(y) *Boswell v. Miller*, Feb. 4, 1846, 8 D. 430 ; *Miller v. Learmonth*, Nov. 21, 1872, 10 Macph. 107. But after the death of the wife and issue, if any ever existed, the husband in such a case may sue for the tocher, there being no one in existence entitled to plead against him his inability to perform his counter-obligations (Inst. l. c.). At this place in the Inst. the author treats of the subject of Reparation, as to which see Note F at the end of this title.

(z) The author in the Inst. l. c., on the authority of a decision mentioned by Bankton (i. 9, 4), regards donations as revocable for ingratitude by the law of Scotland.

so revoked; i 6, § 18. That special sort of donation which is constituted verbally is called a promise; iii. 2, § 1.(a) The Roman law entitled all donors to the *beneficium competentie*, in virtue of which they might retain such part of the donation as was necessary for their own subsistence. Our law allows this benefit to fathers, with respect to the provisions granted to their children (*Buntin v. Buntin*, Feb. 21, 1745, M. 1390, 2895, Elch. "Benef. Comp." 2); and to grandfathers, which is a natural consequence of children's obligation to aliment their indigent parents, but to no collateral relations, not even to brothers.(b)

37. Donations made in contemplation of death, or *mortis causâ*, are of the nature of legacies, and like them revocable; consequently, not being effectual in the grantor's life, they cannot compete with any of his creditors, not even with those whose debts were contracted after the donation. They are understood to be given from a personal regard to the donee, and therefore fall by his predecease. No deed, after delivery, is to be presumed a *donatio mortis causâ*; for revocation is excluded by delivery.(c)

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(a) In the Inst. there is a discussion on the point whether a promise is binding without being accepted by the donee. The law seems to presume acceptance of a promise or offer which lays no burden on the donee (Stair, i. 10, 4; Ersk. Inst., l. c.; Bell's Pr. 9).

(b) See *Hogs v. Hog*, 1749, M. 1390, Elch. "Benef. Comp." 3, rev. Craig & Stair, 469; *Hardies v. Hardie*, July 1, 1813, F.C.

(c) The doctrine of *donatio mortis causâ* is fully explained in *Morris v. Riddick*, July 16, 1867, 5 Macph. 1036. It is defined "as a conveyance of an immoveable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee upon the condition that he shall hold for the grantor as long as he lives, subject to his power of revocation, and failing such revocation, then for the grantee on the death of the grantor. If the grantee predecease the grantor, the property reverts to the grantor, and the qualified right of property which was vested in the grantee is extinguished by his predecease."—*Per Lord Pres. Inglis* (l. c.). Lord Deas adds these characteristics, that "it must be made in the prospect of death, and takes effect only in the event of death occurring from the existing illness." There was such a limited form of *donatio mortis causâ* in the Roman law (l. 1, Inst. de donat., 2, 9; l. 3, 6; l. 8, § 1; de m. c. don., 39, 6); but such donations might also be made *sold mortalitatis cogitatione* (l. 2; l. 31,

Donation is  
not presumed  
in *dubio*.

(92)

In what cases  
is aliment  
presumed a  
donation.

38. Deeds are not presumed, *in dubio*, to be donations. Hence a deed by a debtor to his creditor, if donation be not expressed, is presumed to be granted in security or satisfaction of the debt; (d) but bonds of provision to children are, from the presumption of paternal affection, construed to be intended as an additional patrimony. Yet a tocher given to a daughter in her marriage-contract is presumed to be in satisfaction of all former bonds and debts (*Robertson v. Robertson*, 1685, M. 9619); because marriage-contracts usually contain the whole provisions in favour of the bride. One who alimments a person that is come of age, without an express paction for board, is presumed to have entertained him as a friend, unless in the case of those who earn their living by the entertainment or board of strangers; *Forrest v. Carstairs' Reprs.*, 1715, M. 11,098, 9713. But alimony given to minors who cannot bargain for themselves is not accounted a donation; except either where it is presumed from the near relation of the person alimmenting that it was given *ex pietate*, or where the minor had a father or curators with whom a bargain might have been made; *L. Ludquhairn v. L. Gight*, July 21, 1665, M. 11,425; *Gordon v. Lesly*, June 11, 1680, M. 11,426.

§ 2; l. 35, § 4; *de m. c. don.*, 39, 6; see Savigny's System, iv. 239 *et seq.*; and the question being one of intention and circumstances, it seems unnecessary to impose these restrictions, which are not mentioned by the other judges in the case cited, and appear to be negatived by the judgment in *Fyfes v. Kedslie*, March 6, 1847, 9 D. 852. Donation *mortis causâ* may be proved by parole (*Morris v. Riddick*, *supra*). The last sentence in the text is not accurately expressed, any *mortis causâ* deed being revocable; but delivery in the case of a *mortis causâ* donation *inter vivos* is not absolutely essential (*Crosbie's Trs. v. Wright*, May 28, 1880, 7 R. 823).

(d) This principal is generally expressed in the maxim *Debitor non præsuntitur donare*. But, practically, such questions are for a jury, all the facts of the case, including the relationship and circumstances of the parties, the nature of the gift, &c., being taken into account; and the rule is liable to exception wherever the facts show that not payment of the debt but a gift was intended. Its only effect is to throw the *onus* on the person alleging gift or legacy (*Balfour v. Balfour's Trs.*, March 10, 1842, 4 D. 1044; *Scott v. Scott*, June 2, 1846, 8 D. 791; see examples in Dickson on Evid. § 373 *et seq.*; M'Laren on Wills and Succession, i. 453 *et seq.*).

## NOTE A.

## DELIVERY AND STOPPAGE IN TRANSITU.

(See B. ii. 1, 10, and B. iii. 3, 3.)

"Constructive delivery may operate to pass the property in goods Constructive delivery. sold as effectually as actual, *e.g.*, where the purchaser of a specific quantity of wheat left it in the seller's granary, and the seller addressed a delivery order in favour of the buyer to his warehouseman, who took charge of it for the buyer, making delivery of it as it was required (*Aitchison v. Broughton*, Nov. 15, 1809, F.C.). (a) So a pipe of wine, bought and paid for, was held to have been constructively delivered though left in the seller's warehouse, he having given an acknowledgment to the purchaser that he held it for him, and entered it in his book as the purchaser's (*Gibson v. Forbes*, July 9, 1833, 11 S. 916). This decision is opposed to the doctrine of Bell's Com., vol. i. 171, and to the subsequent case of *Boak v. Megget*, Feb. 13, 1844, 6 D. 662, where certain hides, bought and paid for, but left in the tanner's pits undergoing the process of tanning, and occasionally examined by the purchaser, were held, in a question with the seller's creditors, not to have been delivered. In that case, however, there was no entry of the transfer in the seller's books. When goods sold are left in the seller's repository, the giving up of the key to the buyer is counted an act of real delivery (*Dudgeon v. Brodie*, July 3, 1801, F.C.). If the seller send his own cart with the goods, they continue undelivered so long as they are in his care and unpacked. But the delivery into the buyer's cart, or into a warehouse under the charge of any one representing him, passes the property."

"Where the goods are kept, not in the seller's repository, but in a public bonded warehouse, or in the hands of a wharfinger or agent, due intimation by the seller to the proper custodier, and warrant for delivery to the buyer, completes the transfer, and converts that officer into custodier for the buyer. Goods in bonded warehouse."

"In the case of goods at sea, the transfer is complete by indorsement of the bill of lading, and the shipmaster thereupon becomes custodier for the indorsee. No intimation is necessary to convert the possession, but the delivery of the bill of lading (on sight of which the shipmaster is bound to give up the goods) transfers at Goods at sea; bill of lading."

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(a) *Black v. Glasgow Incorp. of Bakers*, Dec. 13, 1867, 6 D. 137.

once the right and the civil possession (*Bogle v. Dunmore*, Feb. 2, 1787, M. 14,216)."

Stoppage in  
transitu.

"Every seller has the right to retain the goods till the price be paid, unless he has come under an express obligation to deliver and to give credit for the price. But if the goods are once delivered to the purchaser, or to some middleman to be conveyed to their destination, and there delivered to such purchaser, it frequently happens that the purchaser, who was in good credit when the sale took place, becomes insolvent when the goods are in the course of transit from the seller to himself. In such a case, the actual lien arising from possession is at an end; the bankrupt would take the goods, and the seller would be left a simple creditor for the price. A remedy for this evil is now provided by the admission of the principle of stoppage *in transitu*. The seller, if he has reason to suspect the solvency of the purchaser, may stop the goods while they are in the hands of a middleman and in the course of transit to the buyer, at any time before they reach their destination and are actually delivered. At first, the remedy in Scotland was of a different kind, and went a good deal farther. It proceeded on the footing of presumptive fraud within three days of bankruptcy. It was held that the impending bankruptcy must have been known to the bankrupt; that within that period it was fraudulent on his part to take delivery of goods which he knew he could not pay for, and that, if the goods had notwithstanding been delivered, the seller was entitled to restitution if the goods were distinguishable from the rest of his stock. The last case in which in Scotland this doctrine of presumed bankruptcy *intra triduum* was applied was *Allan, Stewart, & Co. v. Stein's Creditors*, 1790. On appeal the judgment was reversed (3 Paton 191). Lord Thurlow held that the case resolved into the inquiry whether the vendors were entitled to stop certain quantities of grain consigned or forwarded by them to Stein, the bankrupt, *before the actual delivery to him*, the bankruptcy having intervened. Thus, with regard to all grain actually delivered, the seller was found to have no remedy."

"The right is, as it were, an extension or prolongation of the seller's lien, even though the goods are out of his possession, and so long as they have not come into the purchaser's possession. The right of stoppage is of course excluded by actual delivery, and it would be equally excluded by that constructive delivery which the law holds sufficient to transfer the right."

"The distinctions in regard to *transitus* are very nice. Thus,

although delivery into the carts or carriages of the purchaser would be regarded as delivery to himself, it is not delivery if the goods are in the hands of a carrier specially appointed by the purchaser to receive them, or of a general forwarding agent of the purchaser, or of an innkeeper; nor if the purchaser hires the carriage or cart or servant of another for the mere purpose of transporting the goods. With regard, again, to goods put on board ship for the purchaser, if the charter-party amounts, as it generally does, merely to a contract for the carriage of merchandise, the captain having the general control and management of the vessel and continuing the servant of the shipowner, the goods will be held to have been received by him in the character of a carrier, and will be *in transitu*. But if the charter-party amounts to a temporary right to the whole ship on the part of the charterer, the master being his servant or agent for the time, the delivery of the goods on board will be a delivery to the charterer or purchaser, and the possession of the master his possession, and the vendor will have no more right to retake them than if he had delivered them into some floating warehouse belonging to the purchaser (*Bothlingk v. Inglis*, 3 East. 397).<sup>(b)</sup>

"Again, if the goods, though they have reached their place of destination, are still in the warehouse of the carrier, with the view of delivery, the *transitus* still subsists; but if they remain at the waggon-office with the knowledge of the purchaser, and to await some ulterior destination, such as exportation to another country, he having no separate warehouse of his own, the *transitus* is at an end (*Rowe v. Pickford*, 8 Taunt. 83, and *Dixon v. Baldwin*, 5 East. 186)."

"These cases are separated by the narrowest line from others, such as *Dunlop v. Scott*, Feb. 22, 1814, F.C., where it was found that goods directed to remain for the vendee at the carrier's quarters till called for, are still considered *in transitu*, and stoppage *in transitu* competent. But the difference appears to be this: that in the English cases the vendee had himself given the direction that the goods should remain till he had assigned to them a new destination; in short, he had conferred on the carrier's quarters the character of his own warehouse for the time."

"The goods must be still undelivered, and in the course of

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(b) See *Schotsmans v. Lancashire and Yorkshire Railway Co.*, 36 L. J., Ch. 361, 2 L. R., Ch. 332; *Berndtson v. Strang*, 37 L. J., Ch. 665.

transmission from the seller to the buyer, and in the hands of some middleman acting as carrier. 'The law,' says Mr. Bell, 'is fixed in favour of the right to stop when goods are in the hands of the vendor's shipmaster, carter, or in the hands of a common carrier by land or water, including shipping companies. Masters of ships on general freight, lightermen, waggoners, and all who hold themselves out as carriers for the public, are properly middlemen, who hold a neutral character and receive goods for the preservation of the seller's lien on the one hand, and of the buyer's right of property on the other. Wharfingers and warehousemen, porters, and all necessary auxiliaries of the carrying trade, are also classed as middlemen.'"

"In the general case, while the goods remain in the possession of any such persons, the possession is held to be for behoof of the seller as well as the purchaser, and the seller may intervene up to the last moment to prevent delivery. But suppose that, instead of allowing the goods to reach their journey's end, the purchaser meets them on the way, and exercises any act of possession on them? In the case of *Mills v. Ball* (June 12, 1801, 2 B. & Ald. 457), Lord Alvanley observed—'If in the course of the conveyance from the vendor to the vendee the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them.' In *Foster v. Frampton* (6 B. & Cr. 107), the consignee came to the carrier's quarters, removed certain sugars to his own premises, and took samples of the others, which he desired to remain at the carrier's quarters; it was held that by the exercise of this act of possession the *transitus* was at an end, and the undelivered sugar passed to the creditors of the bankrupt purchaser; and a demand made for the goods by the buyer when they arrive at the place of destination will cut off the right to stop *in transitu*."

Sub-sale.

"If during the transit the purchaser sell to a second purchaser, and indorse over to him the delivery-note which he has received from the seller, or the bill of lading indorsed to him for the goods, what is the result?"

Delivery-Order.

"A delivery-order is not a negotiable instrument (*M'Ewen & Co. v. Smith*, Jan. 14, 1847, 9 D. 434: aff. March 20, 1849, 6 Bell 240)." (c) It is therefore competent for the seller to countermand the order if delivery has not taken place, or to stop the goods *in transitu* if the price has not been paid, though the first purchaser

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(c) But see iii. 2, 18, note.

who held the delivery-order had indorsed it to another (Addison on Contracts, p. 208)."(d)

"But it is different in the case of a bill of lading transmitted Bill of lading. to a purchaser, and by him indorsed *bonâ fide* for value to another party. The right of the seller to stop the goods, the price being unpaid by the original purchaser, is unavailing against the onerous assignee to the bill of lading (*Lickbarrow v. Mason*, 2 T. R. 63, 2 Ross's L. C. 92; *Morton & Co. v. Abercromby & Co.*, Jan. 8, 1858, 20 D. 362).

"The doctrine, however, only applies where there is perfect *bonâ fides* on the part of the second purchaser taking the indorsation to the bill of lading; for his knowledge of the first purchaser's insolvency, or even notice that the price has not been paid, or his being himself in any way a partner in the first purchase, or any other thing indicating that he had not received the indorsation in *bonâ fide*, but was aiding the first purchaser in evading the right to stop *in transitu*, will be sufficient to put him in the place of the original consignee. It is impossible to lay down beforehand the cases in which the indorsation will thus be held ineffectual. But the general principle is clear, each particular case being a jury question on the proved facts (*Bothlingk v. Inglis*, 3 East. 381, and *Solomons v. Nissen*, 2 T. R. 674, 2 Ross's L. C. 134). Where the question remains simply between the original seller and the first purchaser holding the bill of lading, it is no more than a mere delivery-order, capable of being countermanded, or delivery stopped if payment be not made. And so if the delivery be countermanded before the goods have left the premises, and the countermand intimated to the party who has the custody of the goods, such as the shipmaster, carrier, or other custodier, the right of the original seller to stop delivery remains the same as under a simple delivery-order. It is only where the interests of third parties, *bonâ fide* acquiring right from the consignee, come into play that the negotiable character of the document which is intended to transfer the document comes into play."

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(d) The question of the negotiability of the analogous documents known as iron scrip notes was answered in the negative by the House of Lords, reversing the judgment of the Court of Session in *Bovill v. Dixon* (Feb. 21, 1854, 16 D. 619; July 29, 1856, 19 D. 9, 3 Macq. 1). The law, however, has been altered by 40 & 41 Vict. c. 39 in regard to "documents of title," in the sense of the Factors Acts, 1823 to 1875, whether the documents are handed over to a purchaser by a factor or directly by the seller. See also *supra*, note (c).

Payment of  
part of price.

"If the right of stoppage exists, the payment of *part* of the price does not take it away; and the right still exists as applicable to the *whole* goods sold."

Partial  
delivery.

"A question remains, which is not at this moment very satisfactorily solved. Will partial delivery of the articles sold bar the right of stoppage *in transitu* as to the rest? If the goods were to arrive in parts, by successive vessels, it would hardly be disputable that the delivery of one would not affect the right to retain the rest, if bankruptcy occurred in the meantime. But suppose the whole to have arrived by the same vessel, or the same railway-train, or goods-conveyance of any kind, will the delivery of a few bales which has been begun, put an end to the right of stopping as to the great mass still remaining in the hands of the middleman and undelivered? Here it seems to me the law is in an unsatisfactory condition; for, according to the English cases, the question of the right to stop *in transitu* is made to depend on the *intention* to make at the moment a partial or a total delivery. In *Slubey and Smith v. Heyward & Co.* (2 H. Bl. 504, 2 Ross's L. C. 212), delivery of 800 bushels of wheat out of an entire cargo consisting of upwards of 7000 bushels, was held delivery of the whole cargo, and the right to stop the rest was held at an end. But in *Dixon v. Yates* (5 B. & Adolphus 313, 2 Ross's L. C. 55), the rule is thus qualified by Chief-Justice Denman—"It is said that the delivery of a part operates in law as a constructive delivery of the whole, but that is so only where the delivery of a part is intended to be delivery of the whole." And accordingly, in the case of *Tanner v. Scovel* (1845, 14 M. & W. 28), it was held that where a portion of the goods had been delivered, but without any intention to deliver the rest, the goods were still *in transitu*, and liable to the exercise of the right of stoppage. 'If the vendee,' says Pollock, 'chooses to select a part, intending to select that part only, in such a case the delivery of that part only does not operate as delivery of the whole, and it puts an end to the *transitus* only with respect to that part and no more; the right of lien and the right of stoppage *in transitu* on the remainder still continue.'"(e)

Who may stop  
*in transitu*.

"The right to stop *in transitu* must be exercised by the *vendor* or *consignor*; it cannot be exercised by a cautioner for the price, or the holder of a lien over the goods; nor by a party setting up a

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(e) See *Collins v. Marquis's Crs.*, Nov. 23, 1804, M. 14,223, Bell's Prin. 1303.

claim of retention, as in *Craik's Tr. v. Craik* (June 24, 1842, 4 D. 1452)."

"In England it appears to be fixed that the bankruptcy of the purchaser does not of itself operate as a countermand of delivery. The seller must take some active step, such as intimation to the middleman, to render his right effectual, for if the buyer can obtain actual or constructive delivery before any such intimation, the right of stoppage is at an end. The question can hardly be said to be settled in Scotland; for though the point was raised and argued in the case of *Schuermans & Sons v. Goldie* (July 9, 1828, 6 S. 1110), the decision proceeded on considerations of fraud, apart from the mere bankruptcy. The probability is, that our law would in this respect be assimilated to the law of England, and notice of non-delivery given by the seller to the custodian of the goods, or to those acting for him, would be required."

"But while the mere bankruptcy of the purchaser does not in itself operate as a countermand, nor prevent his taking delivery of goods previously purchased, the bankrupt is at liberty, if he feels that he cannot pay for such goods, to reject them. No man is bound to act dishonestly, and to receive goods which never would have been sent to him except on the footing of full payment (*Wallace & Co. v. Miller*, June 13, 1766, M. 8475; *Stein v. Hutchison*, Nov. 16, 1810, F.C.; *Inglis v. Port Eglintoun Spinning Co.*, Jan. 27, 1842, 4 D. 478). In *Stein's* case it was found that the bankrupt purchaser might even take the goods into his warehouse *custodia causâ*, while at the same time he wrote to the seller intimating his rejection of them."

"There appears to be no fixed rule in Scotland as to the mode of stopping. It may be by judicial authority; by application to the Judge Ordinary, as in *Morton & Co. v. Abercromby & Co.* (Jan. 8, 1858, 22 D. 362); or by application to the Lord Ordinary on the Bills, as in *Stoppel v. Stoddart* (Nov. 15, 1850, 13 D. 61). It may be by presentment to the shipmaster of one of the bills of lading; or, in the case of goods sent by land-carriage, by an intimation, written or even verbal; though, in order to afford evidence of the countermand, it is always safer to put it in writing."

"It has been a subject of much argument, what is the effect of the exercise of the right of stoppage upon the contract? Does it rescind it entirely? Or may the seller still hold the contract effectual to the extent of claiming damages, as well as getting back

Bankrupt may reject goods.

Mode of stopping.

Does stoppage in transitu rescind the contract?

his goods? It seems clear enough that, if the goods had never left the warehouse, and were still subject to the seller's lien, he might retain them, and at the same time insist for damages for breach of contract. But where he has parted with the possession, and only gets back his goods by means of the equitable remedy of stoppage *in transitu*, Mr. Bell seems to hold that in using that remedy the seller should be held as rescinding the contract and renouncing all claim against the buyer (Bell's Com. i. 213). In England the question remains unsettled (*Wentworth v. Outhwaite*, 1842, 10 M. & W. 436; 2 Ross's L. O. 239); but in Scotland it appears to have been determined differently from the opinion expressed by Mr. Bell in *Stoddart v. Stoppel* (Nov. 15, 1850, 13 D. 61)."(f)—MORR.

## NOTE B.

## LAW OF MASTER AND SERVANT.

(See B. i. 7, 38, and B. iii. 3, 5.)

Constitution of  
Contract.

"If the period of service is to exceed a year, the contract must be constituted by a regular and formal writ; for it has been determined in *Caddell v. Sinclair* (1749, M. 12,416), that an informal written contract of service for more years than one is not effectual even for one year if there be no *rei interventus*—a judgment which I think a very doubtful one. (a) If there has been *rei interventus* under an informal written contract, (b) as by entering to the service, the contract will be validated for its own endurance; (c) nor will the mere giving or receiving of arles be deemed as sufficient *rei interventus* to validate an informal written contract."

Tacit reloca-

"When the period of the contract has elapsed, the parties are held to renew the engagement, unless notice be given by the one or the other—just as in the case of tacit relocation on a lease. The period of implied renewal cannot be longer than a year, because no writing intervenes to constitute the renewal, and it may be shorter, as in the

(f) See the like opinion expressed in *Schotsmans v. Lancashire and Yorkshire Ry. Co.*, 28 Jan. 1867, 2 Chan. App. 332.

(a) See *Paterson v. Edington*, June 17, 1830, 8 S. 931; *Currie v. M'Lean*, May 17, 1863, 2 Macph. 1076.

(b) Even where the contract is not in writing, in the case of servants in husbandry, artificers, &c., specified in 4 Geo. IV. c. 34.

(c) *Napier v. Dick*, 1805, Hume 388.

case of a half-year's servant, who can only be presumed to be re-engaged for the same period. In everything except the time, the terms of the original engagement regulate the renewal. To prevent tacit relocation, warning must be given by the master to the servant, or by the servant to the master, forty days before the term, unless there has been a special agreement. It may be given either in writing or verbally, or even *rebus ipsis et factis*, if these be sufficient clearly to indicate that the contract is to come to an end. If a gentleman, it has been said, tell his coachman that he is to give up his carriage at Whitsunday, this is sufficient notice to the coachman that his services are to be dispensed with after that term. But *Maclean v. Fyfe* (Feb. 4, 1813, F.C.) shows that the intention to dismiss a servant after the term must be made unequivocal if tacit relocation is to be excluded. Warning is not required in the case of all servants; indeed only in the case of domestic servants, such as a cook, a footman, a housemaid, a gardener, and other servants of the kind. It is unnecessary in the case of clerks or secretaries, and it would seem also in the case of tutors and governesses."<sup>(d)</sup>

"The question whether a party has really been in the position of a servant and entitled to hire, has occurred where a relative has resided for some time with another, and has discharged the duties which would have been performed by a servant. The law seems to have been settled thus: that if the services were admitted or proved, wages were to be presumed as due, unless it could be proved to be the agreement of parties that the board given was to be in full of all claims for service. The presumption is thus in favour of the servant (*M'Naughton v. M'Naughton*, 1813, Hume 396)."

"Where the period of service is not expressly fixed by the contract, the law has established certain presumptions as to its duration, depending on the nature and character of the service, and the presumed intention of both parties as to the contract. 1. Menial and domestic servants are presumed to be hired for six months only. 2. Farm-servants are presumed to be hired for a whole year, seeing that their occupation depends upon the revolution of the seasons. 3. A gardener(e) is also presumed to be engaged for a year, and

Presumptions  
as to duration  
of contract.

(d) In such cases, however, reasonable notice must be given (*Moffat v. Sheddan*, Feb. 8, 1839, 1 D. 468; *Campbell v. Fyfe*, June 5, 1851, 13 D. 1041).

(e) Or gamekeeper (*Cameron v. Fletcher*, June 9, 1872, 10 Macph. 301).

nearly on the same ground. 4. Overseers and managers are presumed to be engaged for a year, because their duty is one of trust, and it is not to be presumed that such persons would accept a situation from which they might be dismissed at the end of the half-year. 5. The law as to governesses and tutors can hardly be said to be settled. A governess for young ladies, says Baron Hume, p. 396, shall rather be understood to hire for a year if she leaves town and engages with a family who dwell at some distance in the country. But in *Moffat v. Shedd* an adverse view was indicated, and the opinion of the Court appeared to be rather that governesses and tutors were to be presumed as hired for no certain time, and might leave or be dismissed at a day's notice (Feb. 8, 1839, 1 D. 468). The rule as to clerks is also fixed by no actual decision."

**Enforcement.**

"The contract cannot be enforced by the master against the servant by means of imprisonment, in the case of domestic servants. But it has been decided at common law, and independently of statute, that in the case of workmen, mechanics, and artisans, if once the servant has entered to his service and deserts or leaves it, he may be compelled by imprisonment to return to his service, and to find caution to remain in it(*f*) (*Raeburn v. Reid*, June 4, 1824, 3 S. 124 ; *Gentle v. M<sup>c</sup>Lellan*, July 9, 1825, 4 S. 163). Lord Fullerton is said (*Tulk v. Anderson*, June 1, 1843, 5 D. 1096) to have disapproved of these judgments ; but having governed the practice of the country for nearly fifty years, it is not likely they will now be altered. The remedy of imprisonment is not given where the servant has not yet entered to his employment."

**Obligations of servant.**

"Having entered, the servant's obligation is to perform his work with fidelity, honesty, and sobriety ; to avoid insolence in his intercourse with his master and family ; to keep his master's hours, and not to absent himself without leave ; to be careful and not wasteful of his master's property ; and to obey orders without remonstrance, even though they may somewhat interfere with the servant's comfort. Thus, where a master dismissed his servant because he refused to go with the horses to their pasturage till he got his dinner, the dismissal was held justifiable (*Spain v. Arnot*, 2 Stark 256)."

**Not bound to work on Sunday.**

"No servant is bound to work except on lawful days. It does not appear, however, that he is not liable to work on Sacramental Fasts appointed by the Established Church. This must be left to the feelings and discretion of the master. But no servant is bound

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(*f*) *Cameron v. Murray*, March 8, 1866, 4 Macph. 547.

to work on Sunday unless his labour comes within the line of works of necessity or mercy, giving a liberal interpretation to the term, 'works of necessity.' Thus, an apprentice or servant to a barber having been ordered by his master to shave his customers on Sunday morning, refused to do so; and the question arose whether he was justified in his refusal. The case turned mainly on the construction to be put on the Act 1579, c. 70, whereby it is enacted 'that nae handie labour nor working be used on the Sabbath day.' It was held that he was not bound to shave (*Phillips v. Innes*, May 19, 1835, 13 S. 778, rev. Feb. 20, 1837, 2 S. & M'Lean 465). Of course, in the case both of menial servants who have to cook and perform other domestic labours, and in the case of farm-servants, who must attend to the cattle and horses, an exception from the general rule must be admitted."

"Although the servant is not entitled to object when he is occasionally called on to perform some act beyond the strict duties implied in his particular service, he is undoubtedly entitled to object if an attempt be made regularly to change the nature of his employment, or to exact of him services which he did not contract to afford. Thus, an out-door servant cannot be forced to act as an in-door one, and *vice versa*; a person hired to manage a farm is not bound to officiate as a servant of all work; nor a gardener to labour in a turnip field. These are all plain inversions of the servant's position, which he is entitled to resist."

"Immorality on the part of the servant, dishonesty, drunkenness, if repeated after warning, or the revealing of family secrets, are grounds of dismissal of the servant."

"It is ~~is~~ not the desertion on the part of the servant of a day, or even two days, which will form a sufficient ground of dismissal. In one case, <sup>Desertion of service.</sup> however, four days' absence was held to be desertion (*Reid v. Crawford*, May 13, 1822, 1 S. App. 124). No absolute rule can be laid down on the subject, because there may be circumstances which palliate, though they cannot entirely justify, the absence from service."

"The due performance of the servant's duty may be interrupted <sup>Sickness.</sup> by sickness. If that sickness has arisen from a hurt received in course of the master's service, such as a kick from a horse, the servant is entitled to full wages during the period of his sickness, though unfit for work, up to the time when the term of his engagement expires.(g) If sickness has no such origin, the result is, that

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(g) As to liability of employers for injuries to employed, see Note F, on Reparation.

wages will only be due if the period of illness be of moderate duration, and a deduction from these will be made if the length of time during which the party was sick be great in proportion to the duration of the service. In one case, an illness of eleven weeks was considered by a majority of the Court no ground of deduction from wages where the engagement was for one year, though the case is said to have been decided on specialties. Generally there is a disinclination on the part of the Court to encourage such claims of deduction on the part of the master ; and where the master has not been obliged to pay for a substitute, it is hardly conceivable that any claim for deduction of wages would be allowed (*M'Lean v. Fife*, July 4, 1813, F. C.). The rule applies only to illnesses which have not been brought on by the servant's debauchery or imprudence."

Obligations of master.

"The ordinary obligations of masters towards servants need hardly be referred to ; reasonably good treatment in regard to food and lodgings ; regular payment of wages ; and, where no wages have been expressly stipulated, of a proper *quantum meruit*, are implied in every contract of the kind. But the master is not bound in law to furnish medicine or medical attendance where the servant is sick, though in practice this is almost universal ; and if he furnish clothes or livery, these, in the absence of express contract, will be held not to be part of the wages, or to belong to the servant, but to remain the property of the master himself (*Archer v. Molyneux*, 3 C. & P. 470)."

"The marriage of a female servant entitles her to leave her master's service even without the permission of her master, but she is liable for damage thereby occasioned."

Character given by master.

"A master cannot be compelled to give a character to a servant (*Fell v. Lord Ashburton*, Dec. 12, 1809, F.C.). If, at the request of the servant, and on the application of the party intending to hire the servant, he gives a character, it must be strictly true, but if true, the master will be held justifiable, however prejudicial the character may be to the servant ; and in such a case it is for the servant, if he is to maintain a claim of damages, to prove the falsehood, and not for the master to prove its truth (*Christian v. Kennedy*, 1 Murray 427 ; *Anderson*, 1 Murray 429). But the master having given the character ultroneously, the *onus* of proving what he says will be thrown on him, and it will not be necessary to aver malice as the ground of action."

"It is much more common, however, for a master to give a ser-

vant a much better character than he or she deserves ; on the faith of which the party is taken into a new service, and sometimes serious losses are occasioned either by their incompetency or dishonesty. It has not yet been settled by any Scotch decision that in such a case the master giving such flattering and false character would be liable, but it has been so held in England (*Pasley v. Freeman*, 1 T. R. 51, 2 Sm. L. C. 56)."

"From the relation of master and servant, a certain liability against the master arises for contracts entered into, or acts done, or delicts committed by the servant ; for the master has, within a certain range, constituted the servant his agent." Master's liability for acts of servant.

"But in the absence of express mandate, ordinary servants do not possess any implied power of entering into contracts, or binding the master. 1. If the master has been in the habit of dealing personally with a tradesman, and paying ready money, he is not bound for furnishings made to the servant on credit. 2. If these furnishings, however, are proved to have been applied to the use of the family, and he has not given money to the servant to pay for them, he will be liable. If he has given money to the servant for that purpose, and the servant has embezzled it, the master is not liable. 3. Where the master has been in the custom of buying on credit, and paying afterwards, for goods which the servant has ordered, he has thereby sanctioned a course of dealing to which the shopkeeper is entitled to trust ; and the master will be liable for the goods ordered by the servant, always presuming that they are of the same kind as he has been accustomed to order, and such as might reasonably fall within his department, even though the servant has been forbidden to do so ; because such interpellation cannot be known to or affect the *bona fides* of the tradesmen to whom the order is given. It is the master's blame if he did not, by due warning, put the tradesman on his guard against further dealings with the servant (*Oliver v. Grieve*, Hume 319 ; and *Dewar v. Nairne*, Hume 340)."(h)

"On the other hand, if the servant go beyond the legitimate scope of his authority, the master, if not bound by homologation or previous usage, will not be bound. Whenever the servant steps beyond the natural duty or power incidental to his position, and orders or contracts for something of a different character, the master is not bound by any such contract, and nothing but a course of dealing in which the master had recognised such a power on the part of the servant would be sufficient to bind him."

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(h) *Mortimer v. Hamilton*, Nov. 21, 1868, 7 Macph. 158.

Servant's quasi  
delicta.

"The general rule is, that where a servant commits a *quasi* delict, the master is liable if the injury shall have been done while the servant was performing the proper duties for which he was engaged, either by express order, or by that presumed order which his position implied. The liability arises from the same principle as his liability on the servant's contracts; for the servant or agent is only doing that which, but for the delegated authority, must have been done by the master himself."<sup>(i)</sup>

"If damage is done wilfully by the servant, not through mere error or negligence, the master is not responsible any more than he would be for an actual crime, such as theft or assault, committed by the servant. On this branch of the subject the distinctions run very nice. Thus, if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horse of another person, and occasion an accident, the master will not be liable. But if, in order to execute his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be simply negligence or error for which the master will be liable, being an act done in pursuance and not in violation of the servant's employment. Again, if a coachman, sent out on his master's business, instead of going directly to the point, takes some circuitous route, and in doing so, injury is done to some third party, the master is liable, because he has put it in the coachman's power to do the injury by intrusting him with the vehicle for the occasion.<sup>(j)</sup> But, on the other hand, if a servant take his master's carriage out without leave, and when it was in no way wanted for the purposes of his master, and in driving it about for his own purposes injury is inflicted on the person or property of others, the master will not be answerable for any injury he may do; any more than he would if the servant had purposely used his master's carriage to create a collision with another which he wished to injure (*Sleath v. Wilson*, 9 C. & P. 607). Where the servant mounted a neighbour's horse and rode so hard that it was permanently injured, the master, who knew nothing of the matter, was held not liable (*Dalrymple v. McGill*, Jan. 19, 1804, Hume 387)."

"The servant is himself liable for the consequences of his *quasi* delict, as well as the master in whose employment he was when it

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(i) See below. Note F, on Reparation.

(j) The contrary seems to have been decided in *Mitchell v. Craswell*, 13 C. B. 237, which equiparates this case with that stated in the following sentence.

was committed ; and the master has relief against the servant for the damages in which he is subjected, unless they arose from his own wrong directions."—MOIR.

Statutory provisions not applicable to ordinary domestic servants have, at various times, been made for the purpose of enforcing contracts between workmen and artisans engaged in most kinds of manufactures and trades. The chief of these statutes are 4 Geo. IV. c. 34 ; 10 Geo. IV. c. 52 ; 4 Geo. IV. c. 29 ; 30 & 31 Vict. c. 141 ; 38 & 39 Vict. c. 90 (Employers and Workmen Act, 1875). The earlier of these statutes gave the master power to compel fulfilment of workmen's engagements, by means of a warrant for the apprehension of the workman. The Justice of Peace before whom he was brought might commit him to prison for a period not exceeding three months, or might abate his wages, if he should refuse to enter to his work, desert his service, or be guilty of any misconduct or misdemeanour in regard to his service. Statutes as to master and workmen.

A considerable change on this branch of the law was made by 30 & 31 Vict. c. 141, which does not, however, repeal the earlier Acts. Master and Workmen Act 1867. Its leading principle was to remove the apparent inequality in the former law of master and servant, and to make the remedy, in words at least, the same as against both. The changes it introduces are briefly as follows :—

The contract, the parties, and the subject-matter of the dispute, being such as the Justices of Peace might previously have entertained, the Sheriff or Justices may now (sec. 4) proceed to ascertain, (1) if either party has neglected or refused to fulfil the contract ; (2) if the employed has neglected or refused to enter to or commence his service according to the contract ; (3) if the employed has absented himself from the service ; (4) if any question, dispute, or difference has arisen as to the rights or liabilities of either party ; or (5) if there have been any misuse, misdemeanour, misconduct, ill-treatment, or injury to the person or property of either party under such contract of service. The 9th section of the Act empowers two Justices, or the Sheriff, after proof of the complaint, to give redress for the breach of contract, or inflict punishment for the offence complained of. They may, upon conviction, (1) abate the whole or part of wages already due ; (2) direct the specific fulfilment of the contract of service, exacting security therefor, with power of imprisonment until security be found ; (3) annul the contract, apportioning the wages due for so much of it as may be completed ; (4) where pecuniary compensation cannot be assessed, or is an

inadequate remedy, impose a fine not exceeding £20; (5) fix the damages and costs to be paid to the party complaining, inclusive of any wages abated. If the party complained against fail to find security to fulfil the contract, a Justice or the Sheriff (6) may commit him to prison for not more than three months; and power is given (7) to assess compensation, or (8) impose a fine in addition to the annulling of the contract. If any misconduct shall appear to be of an aggravated character, and not to have been committed in the *bona fide* exercise of a right existing, or believed to exist, and if the other remedies provided appear insufficient, the Justices or Sheriff may imprison the offender for not more than three months.

By the Act of 1875, in any competent proceeding in relation to a dispute between employer and employed arising out of or incidental to their relations as such, the Court (1) may adjust and set off against each other all mutual claims, whether for wages or damages, and whether liquid or not; (2) may rescind the contract on such terms as to their mutual claims as seems just; (3) may, in place of damages, or part of the damages, accept security for performance, subject to a penalty in case of non-performance; and where any payment is made by a surety on behalf of a defendant under this Act, it shall be considered a debt which the defendant may be ordered to pay. The jurisdiction of Justices both as to claims, orders for payment, and securities is limited to £10.

Truck Act.

"In the general case, the master is obliged to pay the workmen in current coin, and not in goods. The statute 1 & 2 Will. IV. c. 37, enumerates the kind of servants who must be paid in coin, embracing almost every conceivable class of artisans, miners, quarriers, weavers, glassworkers; but the Act does not extend to domestic servants and agricultural labourers (§ 20)."

"Besides forfeiture of the goods themselves, and the liability to make payment of the whole wages to the workmen as if no goods had been furnished, penalties of a very substantial nature are imposed by the statute upon masters contravening (§ 10)."

Combination laws.

"The older statutes against combinations of workmen for the purpose of forcing on their masters a rise of wages are now repealed, and in lieu thereof certain provisions have been introduced by the 6 Geo. IV. c. 129."

"This leaves it perfectly open either to masters or workmen to combine for their respective objects of advancing or lowering the rate of wages, or for any other matter connected with manufacture,

such as the regulation of hours, the number of apprentices, the number and description of journeymen or servants ; it strikes only against all attempts at coercion to compel third parties to leave their master's service, or to intimidate them by threats to join their association, or contribute to the fund by means of which the strike, as it is called, is kept on foot."—MOIR.

This statute, and also a subsequent one, 22 Vict. c. 84, have been repealed by 38 & 39 Vict. c. 86 (Conspiracy and Protection of Property Act, 1875), by which, and the Trade Union Act, 1871 (34 & 35 Vict. c. 31), the law on the subject of combinations has been materially altered. Freedom of combination remains as before, but every one is liable to imprisonment who uses violence to person or property, or intimidation, or who persistently follows one from place to place, or hides his tools, clothes, or other property, or hinders him in the use thereof, or besets his house or place of business, or follows him, with two or more others, in a disorderly manner.

By 34 & 35 Vict. c. 31, it is provided that combinations for regulating the relations between workmen and masters, between workmen and workmen, or between masters and masters, or imposing restrictive conditions on the conduct of trade or business, shall not be deemed unlawful merely because these purposes are in restraint of trade ; and, if in conformity with the requirements of the Act, they may be registered under §§ 6 *et seq.* The Act also provides (§§ 19 *et seq.*) for the summary intervention of Courts of Law in regard to management of the property and the accounting of the office-bearers of such societies. (See also 38 & 39 Vict. c. 60, § 33 ; and 39 & 40 Vict. c. 22, § 2.)

Miners and colliers are no longer *adscriptitii glebæ*. A series of statutes from 4 Geo. IV. c. 34, to 35 & 36 Vict. c. 76-77, deals with their position, and contains enactments for securing their safety. The employment of females, and of boys under ten (and in some cases of more advanced age) under ground in connection with mines and collieries is forbidden. Mines cannot be opened or closed without notice ; they must be put under the management of persons holding certificates of qualification obtained on examination. General rules are laid down for proper ventilation and fencing, and special rules have to be made and published for the guidance of the miners in each pit ; the whole system is put under Government inspection.

Nearly all handicrafts and trades are now, under the Factory Acts, extending from 1833 (3 & 4 Will. IV. c. 103) to 1878 (41 & 42 Vict. c. 16), placed under supervision by inspectors, and are

Present state  
of the law.

Miners and  
colliers.

Factories and  
workshops.

subject to regulations as to the age when employment may commence, the number of hours it may continue, and the condition of the buildings where the work is carried on.

**Apprentices.**

"The contract of apprenticeship is one whereby, either for valuable consideration or not, a person becomes bound to teach another a certain profession or trade, the apprentice while learning it serving the master in his trade or profession to the best of his ability. While no pupil can enter into an apprenticeship, a minor, with consent of his curators, may."

**Obligations of apprentice.**

"The indenture must be in writing. It must, in order to be binding, either be probative in itself, or be followed by *rei interventus* (*Rymer v. Macintyre*, 1781, M. 5726; *Neil v. Tait*, Jan. 31, 1807, Hume 20)."

"The object of the contract being to learn a particular craft, and at the same time give the master the benefit of his labour, such as it is, the apprentice must give all reasonable diligence to do both. Respect and obedience to the master are implied in this as in all contracts of service, and regard for decency and morality are as clearly required."

**Obligations of master.**

"Idleness and neglect to give due care to acquire the trade which he professes to learn, would, if continued, and after remonstrance, be a good ground for putting an end to the contract, and to a claim of damages at the master's instance for any loss thence arising."

"The master is bound to teach the trade, not in all cases performing this duty himself; but if he leaves qualified workmen in charge of his business, able and willing to instruct the apprentice, this is a sufficient compliance with the obligation in the indenture. But he cannot, without the apprentice's consent, assign the indenture to another, for there is a *delectus personæ* which entitles the apprentice to object to a transference of the contract (*Edinburgh Glass House Co. v. Shaw*, 1789, M. 597)."

"The master is bound to instruct the apprentice in all usual branches of the trade. Thus, where a mason confines his apprentice entirely to hewing, and does not teach him the building portion of his trade, this annuls the contract (*Carswell*, n.r.)<sup>(k)</sup> And the same principle would apply wherever the exercise of the trade involves a variety of separate operations, all to be ultimately combined in one article; such as the erection of a house, the building of a carriage, or other complex operation. Nor can the master compel the services of the apprentice in anything which is beyond the true

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(k) Fraser on Master and Servant, 2nd ed., p. 459.

sphere of the trade which he has contracted to learn ; and this has been carried so far, that an apprentice engaged to learn the preparation of drugs cannot be compelled to sell drugs as a druggist, though it can hardly be said that this was a great variation from the natural course of his employment (*Cheislic v. Cuthbert*, 1665, M. 9150)."

"In the case of domestic servants, no personal chastisement by master is allowed. But in regard to apprentices, over whom he has a higher authority, and whose age renders them not unfit subjects of such discipline, he has the power of punishment within reasonable bounds. Cruel and unreasonable punishment, however, will justify the apprentice in leaving the service (*Smart v. Gairns*, 1794, Hume 18)."

"The contract is terminated by mutual consent, by the death or insanity of master or apprentice. It is not dissolved by the death or failure of one or more partners of a company, so long as there are still partners of the original company remaining. Facts and circumstances in the conduct of parties may imply a departure from the contract (*Robinson v. Smith*, 1800, Hume 20; *Ferguson v. M'Kenzie*, 1815, Hume 21). On this last case, Baron Hume remarks :—'It is true a written contract endures by law forty years. But still in the case of these contracts, which, like indentures, are by their very nature destined for early and immediate execution, and are quite inapplicable to the age and other circumstances of parties at a distance of time, the right must be subject to relinquishment by a deliberate course of conduct on the master's part, continued for a length of time. If the master, having it in his power, make no attempt for a series of years to recover his apprentice, or enforce a claim of damages, this cannot reasonably be construed any otherwise than as a tacit permission to the young man to consider himself as relieved from his engagement.'"—MOIR.

The relation of Master and Apprentice has been the subject of regulation by various Acts of Parliament, as 4 Geo. IV. c. 29 ; 30 & 31 Vict. c. 143 ; 38 & 39 Vict. c. 90. An apprentice may now be ordered to perform his duties, and on failure to do so may be imprisoned ; or the apprenticeship may be rescinded, and if it appear just the premium or part may be ordered to be refunded ; and a surety for the good conduct of the apprentice may be ordered to pay damages not exceeding the limits of his liability under the indenture. In some callings the age of apprentices is dealt with. Thus colliers' apprentices must be at least ten, sea-apprentices at

least twelve, and chimney-sweepers', sixteen (3 & 4 Vict. c. 85 ; 17 & 18 Vict. c. 104 ; 27 & 28 Vict. c. 37).

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NOTE C.

**BANKRUPTCY OF PRIVATE COMPANIES, AND  
QUESTIONS OF COMPENSATION.**

(See B. iii. 3, 9, and B. iii. 4, 5, 6.)

“When a company becomes bankrupt, the stock and funds of the company are primarily liable to the company creditors—the creditors of the individual partners being entitled to nothing till the company debts are paid. After the company funds are so applied, the creditor may rank on the separate estate of each partner for the balance ; or, in terms of the 19 & 20 Vict. c. 79, § 66, the trustee on the estate of the partner may put a valuation on the estate of the company, and deduct from the claim of such creditor such estimated balance, and rank and pay to him a dividend only on the balance.”

“If, after the bankruptcy of the company, one of the partners is solvent and pays the debts of the company, he is entitled to rank on the estate of the other insolvent partners, as in a case of joint cautionary obligation, where one cautioner has paid the principal debt. But an individual partner may become insolvent while the company remains solvent. If the insolvent partner be a creditor and not a debtor of the solvent company, his creditors can claim from the company his share of the stock and profits, after deducting the company debts and obligations. If he be a debtor to the company, the company ranks on his estate with his other creditors for the amount.”

“Questions of importance occasionally arise as to the point, How far compensation is pleadable as between company debts and debts of individual partners ?”

“Suppose that a debt of £500 is due by a debtor to the company, while the same party is creditor of an individual partner for the same amount. If the company bring an action against him for payment of the company debt, he cannot plead compensation on the debt due to him by the individual partner, because the company being an entirely separate person in law there is no *concursus debiti et crediti*. But suppose the case to be reversed. Suppose him to be creditor of

the company for £500, and debtor to the same extent to an individual partner; as the individual partner might assign his claim to the company, so as to place them in the position of being both creditors and debtors of the private party, and thus to entitle them to plead compensation, so, without any express assignation, it seems to be held that under such circumstances, *if the partner does not object to it*, the company may put forward the debt due to the individual partner as compensating the debt due by the company. But this cannot be done after bankruptcy, insolvency, or diligence used against the creditor of the company; because an assignation executed in favour of the company, after such bankruptcy or insolvency, would in itself be struck at as creating a preference over the estate of the bankrupt."

"But where payment of the company debt is demanded from an individual partner, or where the company is bankrupt or dissolved so that the claim on the estates of the individual partners has arisen, the partner may set off the debt due to him against the company debt. Opinions have been much divided on the justice of this result, —Professor Bell and Professor More being inclined to think that in such a case compensation ought not to be pleadable; while it seems now to be fixed law that it is. The cases of *Bogle v. Ballantyne's Cra.*, July 8, 1793, M. 2508; *Scott v. Hall & Bisset*, June 13, 1809, F.C.; and the later cases of *Russell v. Macnab*, May 26, 1824, 3 S. 111; and *Salmon v. Padon*, Dec. 17, 1824, 2 S. 285, must be considered as settling this point; see *Hill v. Lindsay, &c.*, Nov. 12, 1847, 10 D. 78 (Note of Lord Ordinary); *Thomson v. Stephenson*, 1855, 17 D. 739; *Raleigh v. Hughson & Dobson*, 1861, 23 D. 352."—*MOIR. (l)*

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(l) Further, a creditor of a company may plead compensation in respect of the debt due to him by the company against a debt due by him to one of the partners of the company, because, the pursuer being liable *in solidum* for the company debt, there is proper *concursus debiti et crediti*, and this even if both company and partner are bankrupt (*Bogle v. Ballantyne, supra*). A partner of a dissolved company, which is solvent, may compensate a private debt due by him with so much of a debt due by his creditor to the company as falls to his share in the division of the company assets (*Oswald's Tra. v. Dickson*, Dec. 3, 1833, 12 S. 156; *Heggie v. Heggie*, Nov. 26, 1858, 21 D. 31).

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## NOTE D.

## JOINT STOCK COMPANIES.

(See B. iii. 3, 9.)

"Joint-stock companies may exist either at common law, or they may be constituted and regulated by the Joint Stock Companies Acts, particularly the 20 & 21 Vict. c. 14 and c. 80; the 20 & 21 Vict. c. 49, conferring the privilege of registration as a *limited* company on banking companies; and 21 & 22 Vict. c. 75.(a)

"A joint-stock company differs from an ordinary company mainly in two particulars,—in having a board of direction elected by the shareholders, which alone has the management of the company's dealings with the public; and 2dly, by the shares being transferable to other parties according to the rules prescribed by the contract, the doctrine of *delectus personarum* being reasonably held quite inapplicable to such companies. In the case of banking companies, they were allowed by the statute 7 Geo. IV., c. 67, to sue and be sued in the name of their officers, provided they annually gave in the name of the company, and the name and abode of the managers. This power was not possessed by other joint-stock companies, who could

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(a) Since the Companies Act, 1862, 25 & 26 Vict. c. 89 (amended by 30 & 31 Vict. c. 131), no company of more than ten persons can be formed for the purpose of carrying on the business of banking, unless registered as a company under its provisions, or formed under some other Act or letters patent; and no company of more than twenty persons can be formed for purposes of mercantile gain except under the same conditions. Any seven or more persons may by such registration form an incorporated company. Such companies may be formed with or without limited liability; and the liability of partners may be limited either by shares or by guarantee (§§ 4-7). In companies limited by shares, the partners are liable only for the amount, if any, unpaid on their shares. In companies limited by guarantee, the liability of members extends only to the amount they undertake to contribute to the assets of the company in the event of its being wound up. Companies under the Act are incorporated upon registration of a memorandum, which may, and in some cases (as where liability is limited by guarantee) must, be accompanied by articles of association. The Acts contain detailed provisions as to the conduct of the business of such companies, and as to their winding-up, whether voluntarily or by order of the Court. Provision is made for applying the benefit of the Act to companies already existing.

not sue or be sued merely by their descriptive firm. But, practically, this did not occasion much difficulty, because it has been settled since *Commercial Bank v. Pollock's Trs.*, July 28, 1828, 3 W. & S. 365, that such a company may effectually sue or be sued if, in addition to the descriptive firm, the name of some of the individual partners be given."

"Some joint-stock companies hold royal charters, which confer on them the privileges of a corporation, with power to sue or be sued as such, a privilege of limited liability, not to extend beyond the subscribed capital, a right to hold lands, make bye-laws, and all the other privileges which belong to corporations."

"As yet few questions have occurred in Scotland in regard to joint-stock companies; nor can the law be yet considered matured, except to a very limited extent."

"The chief questions which have been raised and decided relate (1) to the liabilities of directors towards shareholders; and (2) the liability of trustees entering into the contract as shareholders in their trust character, either to the creditors of the company or in a question between such trustees and their copartners."

"With reference to the first of these points—the responsibility of managers and directors for misconduct in the management of the bank's affairs, and statements held out by them to the public as to the solvency and prospects of the bank—it seems now to be held as law both in Scotland and England, (1) that if a director of a bank *knowingly* certifies, either in the form of private information or by concurrence in the annual report to the company, that the state of matters is conform to the state of affairs exhibited at that meeting, while he knows the reverse, he will be subjected in damages to a party purchasing on the faith of that representation (*Cullen v. Johnston*, Feb. 16, 1861, 23 D. 574, rev. in part, July 28, 1862, 4 Macq. 424); though the mere allegation that the party who had previously purchased was induced to hold on and not to sell his shares, was not considered relevant to entitle him to damages. In this case of *Cullen* the action was brought not only against Sir William Johnston as director, but also against the manager and secretary of the bank, as conjunctly and severally liable in respect of the untrue reports which they had prepared, and on the faith of which it was said Cullen had acted. In the House of Lords the liability was found to extend, not merely to the directors themselves, but to the manager and secretary,—all parties who joined in committing the alleged fraud being included, on the principle that the servant

Responsibility of directors for misconduct and misrepresentation.

who aids his master in doing a wrong is liable along with him for its consequences."

"When directors of a company, without any inquiry at all, certify certain states of the bank's affairs to be correct by their signature, this implies a liability for injury arising from parties relying on such attestations. But directors are not made liable merely by having put their names to such annual documents or certificates in regard to matters where investigation requires a sifting and valuation of outstanding debts, and where such sifting would imply a degree of investigation far beyond the ordinary duties of their office. In such a case, involving an amount of investigation and check beyond what can be supposed to be expected of any director in addition to the official report of the officers of the bank, it would be hard to hold the directors for the time answerable for all the consequences which might ultimately arise from parties relying on the mere report; see *National Exchange Co. v. Drew*, July 27, 1860, 23 D. 1. To hold otherwise would amount to this:—that no director could ever act with safety unless—(1) He was a perfect accountant; (2) and was to perform the whole duties of such an office by going through the books, examining the vouchers, putting an estimate on every bill or security, and then making up his own mind as to the result in regard to the position of the company. No case, as yet decided, has carried the responsibility of directors to that extent. And how, for instance, could it ever be applied in the case of directors of an insurance office, where the annual statements presented to the public depend on calculations of probabilities made by an actuary, which no director unless himself an actuary could understand, or correct if they were erroneous?"

"It may be true that there is an amount of recklessness or neglect which may render a party liable, though he may not have wilfully or fraudulently given a false statement in regard to the affairs of the joint stock concern. Supposing, for instance, it were proved that advances of great extent had been made by directors to firms already largely indebted to the bank, and in bad credit at the time the additional advances were made; this seems to amount to that degree of recklessness which is sufficient to subject the directors sanctioning these advances in addition to the old debt, in liability for the consequences. The usual excuse for such advances is, that they were made to enable the debtor to tide over a difficulty, in order to enable him ultimately to pay in full. But the ground of liability is relevant, and the question would then

become simply one for a jury, Whether the directors in so doing did their best to redeem the past, or were grossly culpable or fraudulent in making the advances? As yet the cases decided in Scotland scarcely enable any one to say what the result would be if a reasonably good case could be brought forward by directors in defence of advances made by them to prior debtors of the bank, not actually insolvent at the time when the additional advances were made."

"One or two points, however, may be considered as settled. (1) A shareholder alleging injury done through the misconduct of bank directors, or rather managers of a joint-stock company, is not obliged to call every one who has been in the management, either during the whole existence of the copartnery, or even during the time when the special mismanagement of which he complains took place. In cases of wrong, the party aggrieved may either call the whole wrongdoers, or select those whom he thinks most readily answerable in point of pecuniary responsibility, or of more actual and direct connection with the transactions out of which the loss to the shareholder arises (*Leslie v. Aberdeen Bank*, June 19, 1856, 18 D. 1046, and *Tulloch v. Davidson*, June 3, 1858, 20 D. 1045, aff. Feb. 23, 1860, 3 Macq. 783). (2) If the ground of liability be fraud or gross negligence, there must be the most distinct statement wherein the fraud or gross negligence consisted; and if the case stated does not come up to that, the action of damages is irrelevant (*Leslie, supra*). (3) Whatever may be the responsibility of directors, it cannot extend beyond liability for misconduct or fraud of their own while they themselves were in the directorship. There is no inheritance of fraud or misconduct; they are neither responsible for the malversation of their predecessors nor for that of their successors,—*culpa tenet suos auctores*."

"It would rather seem that, in order to ground a claim of damages against directors by a person who has purchased shares, relying on previous statements by the directors of the bank, the pursuer must allege that their fraudulent misrepresentations led to the acquisition of the shares by him; and that it is not enough to allege that through such misrepresentation he had been induced to continue a shareholder, when he could have sold out if the true state of matters had been disclosed. For if the disclosure had been made public, it is evident he could not have sold his shares except at a greatly depressed value; while, if it had been confined to him individually, it would have simply enabled him to commit

a fraud by selling to another party who was ignorant of the true state of matters ; see *Dobbie v. Johnston*, March 4, 1859, 21 D. 624."

"It has been held (*Western Bank v. Bairds*, March 20, 1862, 24 D. 859) that it is not a relevant averment, to subject directors, that they neglected their duty by failing to discover and to disclose losses to the amount of one-fourth of the capital, in which event it had been provided by the contract of copartnership of the company that it should be dissolved ; that where averments are directed against the directors as a body, without specification of the particular acts done by each, no issues could be allowed under which a case of individual and several wrong, as distinguished from joint delinquency, could be raised ; and that a hypothetical allegation that if the directors had not themselves been guilty of abuse of power and fraud in the management of the business, then they had failed and neglected to perform the duties of management, and had delegated and devolved these duties upon the manager, while by holding office they professed to be discharging those duties themselves—was a relevant averment of gross negligence by the directors for the time as a body, but not of neglect of duty on the part of individual members of the board."

"This case also fixed the point, that as a pursuer may in the outset select any of the parties who have done the wrong, so he may settle with any of them by compromise, without losing his right of proceeding against others *in solidum*. This appears to rest on the principle that among parties who have concurred in a wrongful act there is no relief *inter se*, and that, consequently, the wrongdoers against whom the action was persisted in suffered nothing by the discharge of the other defenders."—*MOIR*.(b)

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(b) The law was thus stated in *Addie v. Western Bank*, June 9, 1865, 3 Macph. 899 (H. L.) May 20, 1867, 5 Macph. (H. L.) 80, 1 L. R. Sc. Ap. 145 :—"That in submitting to the shareholders a report on the affairs of the bank and the result of its business for the past year, the directors have a duty to perform, and it is part of their duty not to put forth any statement as to the affairs or prosperity of the bank which they have not reasonable ground to believe to be true. . . . If the case should occur of directors taking upon them to put forth in their reports statements of importance in regard to the affairs of the bank, false in themselves, and which they did not believe, or had no reasonable ground to believe to be true, then, inasmuch as the embodying of such statements in the report imports a representation by the directors that they had reasonable ground to believe them to be true, that would be a misrepresentation and deceit, and, in the estimation of law, would amount to a fraud."

## NOTE E.

CASH CREDIT BONDS AND MERCANTILE  
GUARANTEES.

(See B. iii. 3, 27.)

"A cash-credit is an undertaking by a bank to advance to an *Cash-creditor*, individual or a company, on security, such sums of money as may be required from time to time, (a) not exceeding a certain stipulated amount, to be repaid with interest. By the form of the bond the cautioners are taken bound as co-principals, so that they neither had the benefit of discussion while discussion was required, nor have now the benefit of the septennial limitation of cautionary obligations. (b) On the face of the bond they are in no way distinguishable from the principal obligant, except that he is designated as the person in whose name the account is to be kept, and who is to operate on the credit. The balance at any time due is certified by a signed account from the cashier, which is the warrant of diligence against the cautioner. The bank is not bound to do diligence against the holder of the credit, but may come at once on the securities when they close the account. The bank is entitled to renew bills, and to give time to the debtor without losing their recourse against the cautioner, but not to part with any security which they hold, and which might be available for the creditor's relief."

"Though the cautioners may put an end to their responsibility, *quoad* the future, by notice to the bank, the death of the cautioners does not discharge the liability; but by the form of the bond the obligation subsists against the representatives, not merely for the debt as it stood at the death of the cautioner, but for all subsequent transactions, until they give notice that their liability is to terminate (*Commercial Bank of Aberdeen v. Callander*, Feb. 4, 1801, Hume 88; *Paterson v. Calder*, July 3, 1808, M. App. 'Society,' 4). Bell remarks (Com. i. 370) that the bank ought to give notice to the representatives in case of death; and so no doubt they ought, but there seems to be no legal obligation on them to do so." (c)

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(a) See above, p. 228.

(b) See below, b. iii. t. 3, § 9.

(c) See *British Linen Co. v. Monteith*, Feb. 12, 1858, 20 D. 557.

"It does not appear that a change in the *creditor* under the cautionary obligation, as when some partners of the bank die or retire and others are admitted in their stead, makes any change on the responsibility of the cautioners. But where the change is on the part of the person for whom the cautionary obligation has been undertaken, the case is different. The death of the principal debtor, if he be an individual, undoubtedly puts an end to the obligation, so far as it was prospective; and even where the holder of the credit was a company, a change in that company, Mr. Bell (Com. i. 370) seemed to think, would put an end to the obligation, so that cautioners would no longer be liable for operations going on on the part of the altered company. But unless the bank was made aware of the change in the firm, the liability of the cautioners continued (*Speirs v. Royal Bank*, June 22, 1822, 1 S. 554). The Mercantile Law Amendment Act, § 7, provides 'that no guarantee, security, cautionary obligation, representation, or assurance granted to or for a company consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the maker or granter of the same, after a change shall have taken place in any one or more of the partners, unless the intention of the parties that such guarantee, &c., shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.' This appears to be equally applicable to changes in the firm of the debtor, or in the firm of the creditor; but in the case of banks, which are joint-stock companies with a perpetual fluctuation of partners, the guarantee would probably be held to have been entered into on the footing that changes in the firm were not to affect the validity of the obligation, i.e., 'by necessary implication,' the cautionary obligation would stand good in favour of the existing firm whatever that might be."

Letters of recommendation or introduction.

"Letters of credit, or recommendation, or guarantee, may be assimilated to cautionary obligations, inasmuch as they induce the person to whom they are addressed to give a certain amount of credit to the individual who presents them. General letters of introduction, even though accompanied with statements as to the responsibility or solvency of the party in whose favour they are conceived, create no responsibility for statements *bonâ fide* made, and particularly if made in answer to inquiries. But for all wilful misrepresentations, or even concealment of matters known to

the writer, the party granting the letter of recommendation will be responsible.(d) But if in a letter of recommendation granted with reference to some specific transaction on which the parties are about to enter, the writer gives an assurance that the transaction may be safely entered into, it has been more than once held to amount to a guarantee. In any case a great deal depends on the precise terms in which the recommendation is couched.”(e)

“The very nature of such letter of recommendation implies that it has reference only to some future and contemplated transaction.”

“In the case of such recommendations, when given verbally, in England, no action is maintained on any verbal representation or assurance of credit (9 Geo. IV. c. 14, § 6); and it will appear that the same rule is now that of the law of Scotland.”

“The more ordinary case which occurs in mercantile practice Guarantees. is not that of verbal introduction, or even of letter of recommendation, but of actual guarantee, granted either for a particular transaction, or for a course of dealings either past or prospective. If it is intended to apply to the past, the law requires that it shall be most distinctly made applicable to such transactions. The presumption *in dubio* is, that it is asked and granted with reference to the future.”

“The Mercantile Law Amendment Act, § 6, provides that all guarantees or cautionary obligations, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted to the effect for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation de-

(d) *Parks v. Gould & Co.*, June 6, 1851, 13 D. 1049; *Ross v. Lindsay and Adam*, 1828, Hume 117.

(e) See Bell's Pr. 280; *Rankine v. Murray*, May 15, 1812, F.C.; *Johnston v. Owen*, July 15, 1845, 7 D. 1046. In regard to *Rankine v. Murray*, Mr. Moir says elsewhere—"The letter which was construed into a guarantee concluded with the words, 'I doubt not he will give satisfaction in any transaction he may have with you.' If the general introduction given to Rankine, 'as a person who had always behaved with propriety hitherto,' did not constitute a guarantee, I am at a loss to see how the addition that he was likely to give satisfaction in any transaction he might have with the sellers should make any difference, for it in no way implied any obligation for his actings. And it is to be observed, that if this was a guarantee at all, it was unlimited both in amount and time. It therefore appears to me that the first judgment pronounced in the case of *Rankine* was the sound one."

Import of  
written  
guarantees.

mandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, or making such representations or assurances, or some one authorised by him to subscribe."

"In *Merle v. Wells*, 1810, 2 Campb. 413, a guarantee granted in these terms:—'I consider myself bound to you for *any debt* my brother may contract, not exceeding £100, after this date,' was held to be a guarantee for any debt which the brother might contract from time to time and successively,—as a continuing guarantee to the specified amount. Lord Ellenborough said:—'If a party mean to confine his liability to a single dealing, he should take care to say so'; see *Mason v. Pritchard*, 1810, 2 Campb. 436, 12 East. 227, and *Bastow v. Bennet*, 3 Campb. 220, where the guarantee was for *any tallow or soap* to be furnished. Lord Ellenborough considered the word 'any' as characteristic of a continuing guarantee. On the other hand, where the word 'any' did not occur, the guarantee has been held limited to the first advances (*Allnutt v. Ashendean*, 5 M. & G. 392; *Hitchcock v. Humphrey*, 5 M. & G. 559; Smith's Merc. Law, 9th ed. 470). In our own law one case appears at first sight to conflict with the English doctrine. In *Baird v. Corbet*, Nov. 21, 1835, 14 S. 41, the guarantee was 'of the payment of *any* quantity of malt furnished by you to the Luggieside Distillery Company to the extent of £98, 6s. 8d.' The judges held it a limited guarantee, but influenced chiefly by the fractional specification of the amount guaranteed."

"In *Sir William Forbes & Co. v. Dundas*, June 4, 1830, 8 S. 865, a guarantee in these terms was held a standing guarantee:—'Mr. Dunlop has mentioned to me that he may have occasion to overdraw his account to the extent of £3000, and if he should do so, I hereby become bound to repay the same to you.' The reference to the cash account was held to be equivalent to the word *any* in ordinary guarantees; see *Houston's Exrs. v. Spiers*, July 3, 1834, 12 S. 879."(g)

"The rule of construction and limitation in limited guarantees is very rigid. In particular, such a guarantee is never held applicable to past transactions unless its terms unequivocally indicate this intention (*Glyn v. Hartel*, 8 Taunt. 208)."

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(g) *Veitch v. Murray & Co.*, May 25, 1864, 2 Macph. 1100. *Scott v. Mitchell*, March 8, 1866, 4 Macph. 551, is not easily reconcilable with the previous authorities.

"A letter of guarantee can only be used with reference to the person to whom it is addressed, and by the parties to whom it is given (*Stewart v. Scott*, Hume 91)."—MOIR.

## NOTE F.

## ON REPARATION.

[See p. 368, Note (y).]

"Where injury has been done to a third party, either in his <sup>Reparation.</sup> person, his property, or his character, the law holds that the wrongdoer and his representatives are civilly liable for the consequences of the wrongful act, whether done intentionally or under such circumstances of negligence or recklessness as amount to legal *culpa*. This liability extends not only to acts done by a party himself, but by others for whom he is responsible, if acting at the time within the ordinary limits of their employment. On the other hand, if the act of the servant or party employed was clearly one not done within the limits of his employment, or done contrary to the master's express orders, the master has been held not liable."

"Examples of both classes of cases are to be found in the case of *L. Keith v. Keir*, June 10, 1812, F.C., as contrasted with that of *Linwood v. Hathorn*, May 14, 1817, F.C. In the former case the master was found liable when his servants had used fire in burning a moor, and had thus destroyed a valuable wood belonging to another party. The case is most defectively reported; for it omits the important point that, as appears from the Session Papers, Mr. Keir had authorised his servants to use fire in clearing the moor (*Baird v. Hamilton*, July 4, 1826, 4 Shaw 790).<sup>(a)</sup> In the case of *Linwood*, a person was killed by the fall of a tree which the ground-officer of Mr. Hathorn was cutting near a public road; but as the tree was cut without orders from Mr. Hathorn, who was in Edinburgh at the time, and who had given no general direction to cut trees, the master was held not liable."

"If a party contracts with competent tradesmen to build a house, a bridge, a ship, or any other erection,<sup>(b)</sup> no liability will attach to the proprietor or employer for damages done by the contractor.

(a) See *Mackintosh v. Mackintosh*, July 15, 1864, 2 Macph. 1357.

(b) Or to work a mine (*Shaw v. W. Calder Oil Co.*, 9 Scot. L. R., p. 452).

In order to render the proprietor liable, it must be shown that he was cognisant of and acquiesced in the improper proceedings which caused the injury. But it sometimes becomes difficult to ascertain whether a party truly stands in the position of an independent contractor, or is only a subordinate, acting under the orders of the original proprietor (*Nisbet v. Dickson & Co.*, July 8, 1852, 14 D. 973 ; *M'Lean v. Russell, M'Nee, & Co.*, March 9, 1850, 12 D. 887)."

"The law of England on this point is now the same. *Buck v. Steinman*, 1 B. & P. 404, which recognised a different principle, appears to be overruled by subsequent cases, particularly by *Reedie v. L. and N. W. Ry. Co.*, 1849, 6 Ry. Cases 184, 4 Ex. 244."

Negligence of proprietors.

"If a proprietor allows his property to get into a ruinous or insecure condition, and damage results to a neighbouring proprietor, as by the fall of a chimney or chimney-can, the proprietor is liable (*Cleghorn v. Taylor*, Feb. 27, 1856, 18 D. 664 ; *Campbell v. Kennedy*, Nov. 25, 1864, 3 Macph. 121)."

"In like manner, a proprietor is liable for not fencing-in an old and abandoned coal-pit (*Black v. Caddel*, Feb. 9, 1804, M. 13,905, aff. 1812, 5 Pat. 567 ; *Hislop v. Durham*, March 14, 1842, 4 D. 1168); or for digging a pit in the course of the erection of a house, and not effectually protecting it (*Innes v. Magistrates of Edinburgh*, 1798, M. 13,189). But a question has been raised, How far is a proprietor liable for injury done to the property of others through the misconduct of his tenants? Suppose, as is often the case in Edinburgh, that he has let a tenement consisting of various storeys to various tenants ; and that he has let these flats in good condition in all respects, so that any injury that arises is not imputable to him, but to the mismanagement of one of the tenants, is the proprietor to be responsible? This was negatived in *Weston v. Tailors of Potterrow*, July 10, 1839, 1 D. 1218."

Claims against masters for injuries sustained by the servants in course of their employment.

"It is the Law of Scotland, as it has long been that of England, that the servant entering on an employment which he knows to be attended with hazard, takes upon himself the risks of accidents which are unattended with blame on the part of the master. The master must take all reasonable care that the work is conducted with the usual precautions ; that the superintendents and others employed are competent for their respective duties ; that the machinery, materials, or other adjuncts of the work are in sound working condition. But if, after all these conditions are sufficiently attended to, an accident happens, and injury is done to a workman, he has no claim for reparation. Thus, in *Cook v. Bell*, Nov. 28, 1857, 20

D. 137, a miner having been killed by the falling in of the roof of a mine, it was found that no claim of reparation existed,—the master having provided the proper amount of wooden supports for the roof, which the workman apparently had not put up; see *M'Neill v. Wallace*, July 7, 1853, 15 D. 818. It would have been otherwise if the accident had happened through neglected ventilation causing an explosion of fire-damp, or some similar cause; for there the master would be liable even though there were some rashness on the part of the miners in going to work without ascertaining that the proper inspection as to the state of the ventilation had taken place (*M'Neill v. Wallace*, *supra*). But although the master is only responsible while the servant is engaged in his employment, a great latitude is allowed in the construction of what is being engaged in his employ. Thus, if miners have been taken down into a mine, and, when they choose no longer to be employed, require to be taken up again, it is the duty of the master to take them up safely. For that purpose the liability of the master continues after the termination of the service. 'Whatever the servant does in the course of his employment, according to the fair interpretation of it,—*eundo, morando, redeundo*,—for all that the master is responsible, and it does not make the smallest difference that the workmen had no lawful excuse for not going on, nor proper cause for leaving their work.'—*Per* L. Cranworth, C., in *Brydson v. Stewart*, March 13, 1855, 2 Macq. 30."

"There remains the case of injury done to a servant by another fellow-servant in the course of their employment while engaged in their common business. Is the master or employer liable for such damage, everything on his part in the way of precaution, or proper furnishings, or machinery, being complete?" Injury by fellow-servant.

"Prior to the judgment of the House of Lords in the *Bartonshill* cases, the Scotch decisions were in favour of the proposition 'that since the employer is liable to third parties for injury sustained by them, he is *a fortiori* liable for those sustained by his own servants through the act of a fellow-servant.' In England the rule was different; a master not being liable for injury inflicted on one servant by another, if the servant causing the injury was a person of ordinary skill and care. But the *Bartonshill* cases brought the question as to the collision of the laws of the two countries to a point. In *Reid v. The Bartonshill Coal Company*, July 3, 1855, 17 D. 1017, *rev.* June 17, 1858, 3 Macq. 268, a miner was killed by the overturning of a bucket or cage in which he and another workman were being drawn up from the pit by means of a stationary engine at the pit-mouth,

in consequence of Shearer, who was employed by the defenders, and had charge of the engine, having allowed the cage to be drawn up considerably higher than it ought to have been. Shearer was proved to be a trustworthy man, and of good character. The Court of Session held that the Lord President had rightly directed the jury, that if the injury was caused by the fault of Shearer in the management of the machinery, the Bartonshill Coal Company were in law answerable. On appeal the judgment was reversed. Lord Cranworth said :—‘ The question for decision is, Whether in the working of a mine, if one of the servants employed is killed or injured by the negligence of another servant *employed in some common work*, that other servant having been a competent workman, and properly employed to discharge the duties intrusted to him, the common employers of both are responsible to the servant who is injured, or to his representatives, for the loss occasioned by the negligence of the other. . . . When the workman contracts to do work of any particular kind, he knows or ought to know to what risk he is exposing himself: he knows, if such be the nature of the risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot protect him.’ ”

The Act 43 & 44 Vict. c. 42 has to some extent restored the law as laid down and acted upon in Scotland prior to the *Bartonshill* case. Employers are declared liable for any injury arising from defects in roads, machinery, or plant, caused by their negligence; or from the negligence of any superintendent in the service of the employer while in the exercise of his superintendence; or where the injury arose from obedience to orders negligently given by one whom the injured man was bound to obey; or from the act or omission of any one acting under the rules of the employer, or under the instructions of any one delegated by the employer; or from the negligence of any one in the employer's service who has charge of railway-appliances. The law applicable to injuries sustained by a fellow-workman still, however, subsists, except so far as repealed by this Act.

Common  
employment.

“ But what does the term *joint employment* in the same concern mean? I have already directed your attention to these words as of great importance in the speech of the Lord Chancellor in determining the main question in the case of the *Bartonshill Company*. This point is illustrated by the case of *M'Naughton v. The Caledonian Rail. Co.*, Jan. 15, 1857, 19 D. 271, which shows that there still remain many questions open as between the doer and the receiver of the injury in regard to their positions of superior or

subordinate, and also in regard to the question whether two servants of the same master, but working in quite separate departments, can be considered as servants in a common employment within the reasonable meaning of such a term.”(c)

“If parties put themselves in the way of danger, by trespassing on ground not belonging to them, and which the proprietor was not under any legal obligation to fence in, no claim for damage will be maintainable (*Balfour v. Baird*, Dec. 5, 1857, 20 D. 238; *Davidson v. Monklands Railway Co.*, July 4, 1855, 17 D. 1038; *Hardcastle v. South Yorkshire Rail. Co.*, 28 L. J., Exch. 138).”

“In these cases the only *culpa* was on the side of the party injured. But suppose a clear *culpa* on both sides, to a certain extent; it has been ruled in England that the person aggrieved may recover unless it appear that he might by the exercise of ordinary care have avoided the consequences of the defendant’s fault. In that case he will have no claim. It is not enough for him to say the defender was wrong, if by the exertion of ordinary care he might have prevented the result. In *M’Naughton v. Caledonian Rail. Co.*, Jan. 15, 1857, 19 D. 271, it was held that where an event is brought about directly by the *culpa* of two persons, whether joint or several, where the *culpa* of each has contributed to produce the event, and the event would not have been produced but for *culpa* of both, there can be no claim as between these for reparation of injury flowing from that event; see *Senior v. Ward*, 28 L. J., Q. B. 139.”

“Some peculiar rules of liability have been introduced by custom in regard to reparation for injuries arising through the collision of ships.”

“These rules are thus laid down by Lord Stowell in the *Woodrop*, 2 Dodson Adm. 85. There are four possibilities under which a loss of this kind may occur.”

(c) It was for some time maintained that a foreman or superintendent to whom the master has delegated his authority is not a fellow-servant, but “a deputy-master,” for whose negligence the master is liable to others in his employment. But there is now no distinction between workmen of different grades (*Wilson v. Merry & Cunningham*, May 31, 1867, 5 Macph. 807, aff. May 29, 1868, 6 Macph., H.L., 85). Persons engaged in different departments of the same concern may yet be engaged in a common employment, e.g., a carpenter employed to do work for a railway company at their station, and the porters employed for the traffic on the line (*Morgan v. Vale of Neath Railway Co.*, Ex. Ch., 35 L. J., Q. B. 23; see *Warburton v. G. W. Railway Co.*, 36 L. J., Exch. 9). A seaman is the fellow-labourer of the captain of a ship (*Leddy v. Gibson & Co.*, March 18, 1873, 11 Macph. 304).

Contributory negligence.

Collision of ships.

Different departments.

Foreman.

"1. It may happen without blame being imputable to either party ; as where a loss by a collision is occasioned by a storm or any other *vis major* ; in that case the misfortune must be borne by the party on whom it happened to light, the other not being responsible to him in any degree."

"2. A misfortune of this kind may arise when both parties are to blame, where there has been a want of due diligence and skill on both sides ; in such a case the rule of law is, that the loss must be apportioned between them as having been occasioned by the fault of both."

"3. It may happen by the misconduct of the suffering party alone ; and then the rule is that the sufferer must bear his own burden."

"4. It may have been the fault of the ship which ran the other down, and in this case the injured party is entitled to an entire compensation from the other."(d)

Liability of  
railway-  
companies.

"In regard to the liability of railway-companies for injury to passengers,(e) the law holds that they are bound to provide against accident so far as human foresight and regard for the safety of the passengers can enable them to do so. The carriages and rails must be in sound condition ; they must employ proper officers ; lay down and enforce such rules as to the use of the railway as experience dictates ; and a very slight deviation from these rules once laid down, or negligence on the part of the officials, will be sufficient to subject the company."

"It does not yet seem to be settled whether in such a case the proof of negligence lies with the party injured, or whether it lies with the company to prove soundness and care on every point. I incline to the latter view."(f)

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(d) See Bell's Com. i. 579 *et seq.*; *Boettcher v. Carron Co.*, Jan. 17, 1861, 23 D. 322.

(e) *I.e.*, all persons travelling by consent of the company, whether paying fare or not. The contract, though extending over other lines, is regarded as single.

(f) It is fixed that action lies against a railway-company only on the ground of negligence, which must be proved by the pursuer. The carrier of passengers undertakes no warranty of safe conveyance, but only to take due care, including in that term the use of skill and foresight ; and *negligence* alone is a breach of this contract. "Due care" means, however, a high degree of care, and throws upon carriers the duty of exercising all possible vigilance to see that whatever is required for the safe conveyance of their passengers is provided and kept in proper order and repair. But this duty will not make carriers responsible for injuries to

"In *Innes v. The Magistrates of Edinburgh*, 1798, M. 13,189, it was held that the defenders, as being the conservators of the streets, and bound to see that they were kept in safe condition for the use of the lieges, were liable for damages occasioned by an accident happening to a party who fell into an excavation made in the street and imperfectly fenced. And that decision was lately followed up in the case of *Dargie v. The Magistrates of Forfar*, March 10, 1855, 17 D. 730."(g)

"The question has arisen, how far the road-trustees, or rather the funds of the road, or any other public body administering funds for a public trust, are liable for damages resulting from obstructions on the road, or by the fault or negligence of the trustees, their officers, servants, or contractors. In some cases our Courts found that the road-trust funds were liable. But in *Duncan v. Findlater*, where the Court of Session had found trustees liable to the extent of the trust-funds for an accident arising from the state of the road, the judgment was reversed in the House of Lords, June 19, 1838, 16 S. 1150, rev. July 8, 1839, M'L. & Rob. 911."

Liability of trustees for public purposes.

"It was held that the Turnpike Acts did not authorise the application of the funds levied under their authority in order to compensate damages arising from the improper act of any person employed under the authority of the trustees; but if the thing complained of was within the Act the party injured could have no remedy, and if beyond the Act, a public fund should not bear the burden."

"It is plain that this decision points at the personal liability of the road-trustees for damages by accidents arising from mismanagement of the road. The principle, that public funds raised by statute are not liable for damages for negligence must apply to the case of Harbour Trustees, Commissioners of Police, and others (*Clyde Trustees*, July 16, 1842, 4 D. 1521)."(h)

passengers arising from a latent defect in the machinery they are obliged to use, and which no human skill or care could either have prevented or detected. Even in the case of common carriers of goods, who are liable against all events under the edict *Nauta*, &c. (see above, p. 301), there seems to be no warranty on the part of the carrier that his carriages are road-worthy (*Readhead v. Midland Ry. Co.*, 36 L. J., Q. B. 181, 38 L. J., Q. B. 169, Ex. Ch.).

(g) See *Keir v. Mags. of Stirling*, Dec. 18, 1858, 21 D. 169.

(h) Whatever may be the authority of the cases cited, if questions of liability shall arise in similar circumstances and under the same statutes, the principles here stated on the authority of Lord Cottenham's opinion in *Duncan v. Findlater* have been authoritatively declared to be erroneous

**Seduction, &c.** "Reparation is also due for seduction, either of an unmarried or a married person; for injury to the person by a fault; and for wrongous imprisonment, either in violation of the provisions of the Act 1701, c. 6, or at common law."

**Slander.** "Reparation is due for injury to character and feelings as well as to person and property. Calumnious statements in the general rule are presumed to be malicious; but in certain cases which are called

**Privilege.** privileged,—as in the case of judges using injurious statements in the course of judicial procedure, or parties making statements in the discharge of official duty; or counsel in the conduct of a case; clergymen in cases of church censure; statements made in Parliament,—malice is not presumed, but must be averred and proved. In the case of Parliamentary proceedings it has been decided by the Court of Queen's Bench, in *Stockdale v. Hansard*, 2 Mood. & Rob. 9, as to reports of committees containing libellous matter against individuals, that it is no justification to the publisher printing them that he had the authority of the House of Commons for their publication. On the other hand, the House of Commons declared such actions a breach of privilege; and in this unsatisfactory position and conflict of authority the question at present stands."<sup>(i)</sup>

"Private parties also are privileged, when called on in self-defence or by duty, to state what may be offensive or injurious. So a master in giving a character to a servant is privileged. A near relative is privileged to give information of misconduct which may have influenced an intended marriage."

"The privilege, however, only throws on the pursuer the proof of malice, for no privilege will protect a party who has maliciously published a false statement."

"Mr. Bell thus sums up the existing state of the law as to the privilege, if such it can be called, enjoyed by the press. 'The press is free. But the party who publishes is responsible for any libel

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by the House of Lords and all the English Judges in *Gibbs v. Mersey Docks and Harbour Board, &c.*, and *Penhallow v. Eosd.*, 35 L. J., Ex. 225; L. R., 1 H. L. 93. Officers of public departments of Government are not liable for the faults of their subordinates, who are the servants of the Government and not of their official superiors (*Lane v. Cotton*, 2 L. Raym. 646; *Whitefield v. Le Despencer*, Cowp. 754; *Nicholson v. Mounsey*, 15 East. 384; *Watt v. Blair*, 1821, 1 S. App. 48).

(i) The publication of a faithful report of a debate in Parliament, in the course of which defamatory statements were made, is privileged; as are also articles fairly commenting on the debate (*Wason v. Walter*, 38 L. J., Q. B. 34).

or defamation of which he may be guilty. The conduct of a public man (a member of Government, a functionary under Government, or a Member of Parliament) is open to animadversion and censure ; but that must be confined to his public character. A person attending as a member of a public meeting, and taking part in the proceedings, is subject to the same animadversion on his public character, and has the same protection of his private character. An author is liable to criticism in his capacity as an author, but protected as other men are in his private character' (Princ. 2055)."

"Even libellous or defamatory matter contained in a private letter is actionable ; not of course on account of any actual pecuniary interest which is affected, because if the party who receives the letter does not communicate its contents that is impossible, but because an injury is thereby done to feelings, which no man is entitled to inflict on another without being liable in damages, whether the communication has been open and undisguised or only afterwards discovered. A similar principle has been acknowledged and acted on in the case of caricature representations of private parties, or writings or representations concerning them, exposing them to contempt in their *private capacity*."

"The mere injury to feelings which may be occasioned by a systematic perseverance in addressing to an individual private comments and criticisms not only on what he had done in his public character but also in his individual and social relations, apart from all public positions, has most justly been regarded as a ground of damages."

"No question has more keenly been contested in regard to the law of libel or injury to character than the very important one, when one is concluded against as liable for damage arising from statements made by him : Is he entitled to escape responsibility if he undertakes to prove the truth of all the statements which he has made? or 2ndly, where he undertakes to prove at least a part of them, so as to obtain a modification of damages? In a proper criminal action arising out of anything giving rise to damages, such as an action for assyhtment, or the damage which would be payable criminally if the case had been brought in the Criminal Court of Scotland, no justification seems to be receivable to the effect of removing the penal consequences of the delict."

"But in the ordinary case, when the action concludes for the civil remedy of damage, the law, though I state it with some hesitation, appears to me to be this :—

Rules as to  
justification.

"1. That by the law of England, which in this respect accords with the rule of the civil law, the truth of facts which are said to be slanderous may be proved, and form an absolute bar to the claim to damages."

"2. That in Scotland the *veritas convicii*, or the offer to prove the truth of the defamatory statement, is no answer in a *criminal* action for libel."

"3. That in a civil action of damages for defamation, the *veritas convicii* was not at one time admitted in justification of the offence, without some circumstances appearing in the case sufficient to support the presumption of the defender's want of malice."

"This doctrine is superseded by the judgment in *Mackellar v. D. of Sutherland*, Jan. 14, 1859, 21 D. 222. So that the law of Scotland and of England appear to be now the same in regard to the competency of pleading the *veritas convicii* in defence."

"4. An important question remains. Suppose a party takes no issue in justification, can he be allowed to prove the truth of the statements in mitigation of damages? This was the question which occurred in the case of *M'Neill v. Rorison*, Nov. 12, 1847, 10 D. 15, where the law was laid down in conformity with that of England, overruling *Ogilvie v. Scott*, July 3, 1836, 14 S. 1080, and establishing the rule,—that where no issue in justification has been taken, a defender cannot be allowed to plead the *veritas convicii* in mitigation of damages."(k)

"5. Probable cause is occasionally pleaded in defence to actions of defamation. The rule appears to be, that where it is necessary for the pursuer to aver malice, probable cause or reasonable ground for making the statement is a relevant defence. But where no privilege exists so as to render an averment of malice on the part of the defender necessary, a counter-issue, alleging reasonable and probable cause, will not be allowed. Where the defence of probable cause is admissible, it would seem that it is maintainable without taking a separate issue to that effect."—MOIR.

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#### NOTE G.

#### AFFREIGHTMENT, BOTTOMRY, AND RESPONDENTIA.

Definition.

"The contract of affreightment is that by which an entire ship, or some principal part of it, is let to a merchant for the conveyance

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(k) *Craig v. Jex Blake*, July 7, 1871, 9 Macph. 970.

of goods on a determined voyage to one or more places (Abbot on Shipping, iii. 1). The instrument by which the contract is effected is termed a charter-party, but a formal deed is not necessary; a letter or heads of agreement are sufficient, and sometimes the contract is left to be implied from the bills of lading alone."

"The charter-party specifies the ship, either the whole or the part to be let, the term during which it is to be let, or the voyage; the hire to be paid, the time of loading and unloading (or lay days), and the allowance for extra detention, or, as it is called, *demurrage*. It generally expresses the tonnage or burden of the ship, though such statement is not conclusive against the parties (Smith's Merc. Law, 9th ed. 290; *Hunter v. Fry*, 2 B. & Ald. 421)."

"In all contracts of affreightment it is implied—(1) That the ship is in all respects fit for the voyage, and provided with a proper master and crew; that pilots shall be provided where pilots are usually employed; that the ship shall have the usual papers and clearances required at the ports where she is to touch: that she must sail at the day appointed, wind and weather permitting; must perform the voyage according to the rules of good seamanship; must avoid, so far as practicable, all deviations; must stow, load, and unload the goods with due care, and deliver them safely (see Bell's Prin., §§ 408, 409)."

"The counter-obligations of the shipper are to furnish a lawful cargo; to have it ready for embarkation at the time fixed; to pay the freight; and to avoid delay in taking delivery."

"The bill of lading granted by the master fixes on him the possession of the goods and the obligations of safe custody, due care in the voyage, and delivery to the person who holds the bill of lading, or to whom the bill of lading has been indorsed by the shipper. The master granting a bill of lading for goods as received in sound condition, fixes on the owners the obligation of delivery in the same condition. But care is generally taken to state on the face of the bill of lading itself that the quantity and quality of the article are ascertained. The contract of affreightment being in its nature an entire contract, the general rule is, that unless the voyage be completed, the shipper is not liable in payment of the freight, even where the ship has been hired by the month or the week; unless there has been an express stipulation that freight shall be payable even when the voyage has not been completed. But an interruption of the regular course of the voyage happening without the fault of the owner, does not deprive him of the freight if the

Charter-party.

Obligations of ship-owner.

Obligations of shipper.

Bill of lading.

Voyage must be completed.

ship afterwards proceed with the cargo to her place of destination, as in the case of capture and re-capture. Again, if the voyage be divisible into parts, and these be clear and distinct, freight may be demanded for the part performed, *pro rata itineris peracti* (Bell's Prin. 422)."

"The responsibility of the owners under their contract for delivery of the goods shipped in the condition in which they were delivered on board, does not arise if the vessel has been properly equipped and the goods stowed properly and protected from injuries arising from perils of the sea, hostile force, or inevitable accident. But where the loss arises from want of skill or faulty navigation, all authorities, English or Scotch, hold them to be liable."

"As public carriers by water, the owners would be liable under the edict of *Nautæ caupones*, like innkeepers and stablers. But by various statutes they are exempted from liability by fire. They have also been found not liable for robbery of gold and silver and other articles of value, unless their nature, quality, and value have been declared in writing to the owners or inserted in the bill of lading; and where they are liable it is only to the amount of the value of the ship and freight."

"The owner has a right of lien over the goods until the freight is paid, which is good against any one into whose hands the bill of lading may have come."

Bottomry  
and respon-  
dentia.

"Bottomry and *respondentia* are contracts for money lent to the owners of ship or cargo at home, or to the master in a foreign country, on the condition that if the subject on which the money is taken be lost by sea risk, or by superior force of the enemy, the lender shall lose his money; and that if the voyage shall be successful, the sum shall be repaid with a certain profit or consideration for interest and risk, as agreed upon; and for payment both the person of the borrower is bound, and the ship in bottomry, or the goods in *respondentia*, are in certain cases hypothecated to the lender. In *respondentia*, however, the chief security is personal (Bell's Com. i. 530)."

"These contracts have now lost much of their importance, being chiefly confined to the security of loans to foreign shipmasters."

"At home the master is not entitled to enter into such a contract, so as to bind the owners or the ship. But in a foreign port, from the necessity of the case, he is held to possess the power."

"The bond, if effectually granted for advances or repairs to the ship, binds both ship and owners, and gives a preference to the

bottomry creditor over all personal creditors of the owners. And, unlike other securities, in questions between bottomry creditors themselves, the creditor under the last bottomry bond is preferred, because it is by means of this advance that the ship has been preserved and rendered available. But seamen are preferable for their wages even to a bottomry creditor."—MOIR.

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NOTE H.

CONTRACTS OF INSURANCE.

"Insurance is a contract of indemnity against loss in consideration of a sum or premium to be paid." Insurance—  
Marine.

"It has been decided in England, with reference to the clause of insurance in the policy, that an insurance *from A to B*, meaning place A to place B, only protects the subjects insured *from* the moment of the ship's sailing from A; while an insurance *at and from A to B* protects the subject insured from the first moment of the ship's arrival at A, and during her whole stay there, till she reaches B. Generally the contract provides that the risk on goods insured is to commence from the moment the goods are loaded on board, and shall not terminate until they have been discharged from the ship and safely landed at the port of delivery. The risk on the ship commences at the port from which she sails, and continues for twenty-four hours after her arrival at her port of destination."

"The value of the goods or of the ship is sometimes filled up in the policy itself, in which case it is called a *valued* policy; but it is often left blank, the value to be afterwards estimated, which is called an *open* policy. Where the value is fixed on the face of the policy itself, it cannot afterwards be set aside, except on proof of fraudulent over-valuation."

"The enumeration of the perils assured against is by the ordinary form of policy so comprehensive that it seems to embrace every conceivable risk to which the ship, goods, or freight can be exposed. It includes perils of the sea, including collision with other vessels; detention by foreign powers; jettison, or the throwing of goods overboard for the safety of the ship; barratry, as where the master and crew run off with the ship, or employ her in some illegal contract; and the enumeration concludes with the words 'other perils,' under which it has been held that cases like Risks  
covered.

the following have been included, viz., a ship fired on by mistake by a British cruiser, or a ship in dock blown over by a land breeze. See Bell's Pr. 472 (7th Subdivision)."

"Insurance is eminently a contract *bonæ fidei*, requiring the utmost truthfulness in the party insuring. Hence not only will any misrepresentation be fatal to the policy, but even concealment of any circumstances material to the contract."

**Premium.**

"The payment of premium is one of the *essentialia* of the contract. Hence, says Arnould on Insurance, vol. i., p. 8, it is an elementary principle of insurance law 'that the underwriter pays no loss except with reference to the sum on which he is paid premium; the whole sum if the loss be total, some aliquot part of the sum if the loss be partial.' It is usually calculated at so much per cent. on the sum insured."(*a*)

"In some foreign countries, and particularly France, insurance is confined to an indemnity for the loss of a tangible article, such as ship or cargo. But in this country the indemnity may be extended so as to cover the loss of profit, such as freight which would have been earned if not intercepted by the perils of the sea. Insurance, therefore, may be effected (1) on the ship; (2) on the cargo; (3) on the expected freight, or the expected profits on the sale of the cargo."

**Policy and stamp.**

"For maritime insurance a written instrument bearing a stamp(*b*) is required, which is termed a Policy, and which, as is justly remarked by Mr. Bell, 'is an ill-drawn and loosely expressed document, but in all its material points now settled by precedents.'"

"The policy must contain the name of the party interested in the assurance, or of the consignor or consignee; the name of the ship and the master; the goods insured under a general description sufficient for their identification; but it is not necessary that the nature of the insurer's interest shall appear on the face of the policy. It invariably bears that the subjects of the contract are insured 'lost or not lost,' a clause which is introduced because policies are frequently effected not only on ships or goods in home ports, but on ships in a foreign port or at sea, and in regard to

(*a*) There must have been actual risk incurred; if not, the premium must be returned.

(*b*) 30 & 31 Vict. c. 23, and 33 & 34 Vict. c. 97. By 39 & 40 Vict. c. 6, an unstamped marine policy may be stamped on payment of a penalty.

which it is impossible to ascertain whether they may not have been actually lost at the time when the policy was effected. Such a policy is an indemnity against all past as well as all future losses sustained by the assured."

"The policy must distinctly set forth the nature of the voyage on which the ship is to sail, not indeed minutely, but stating the place or period at which the voyage is to begin, and the place at which it is to end, technically termed the *terminus a quo* and the *terminus ad quem* of the voyage insured (Bell's Illustrations, i. 293 to 298)."

"A warranty is something different from representation, and if given is most strictly enforced. Thus a ship was warranted to sail with convoy. She sailed without, but joined the convoy and continued with it for nearly a month. She was separated from the convoy by a gale and captured, and it was found that the insurers were not liable, the warranty to sail *with* convoy not having been complied with to the letter; although it was impossible to say that her ultimate capture had the least connection with her having originally sailed without convoy (see the cases of *Dunmore & Co. v. Allan*, June 27, 1786, M. 7101, and *Monteith v. Cross*, Dec. 10, 1788, M. 7105). A warranty to sail on a particular day implies that the ship shall have commenced her voyage on that day (*Nelson v. Salvador*, 1 M. & M. 309). And a warranty that a ship shall not sail till after a given day is construed as strictly (*Vezian v. Grant*; see Marshall on Assurance, 359)."

"Besides the express warranties which appear on the face of the policy, there are warranties implied in every transaction of the kind. It is implied that the ship on which the assurance is effected is seaworthy, and provided with a proper master and an adequate crew; and however much the assured may have been in *bond fide* as to seaworthiness, the fact that the ship was really not seaworthy at the time vitiates the policy. But seaworthiness is presumed, and the *onus* of establishing the reverse lies on the underwriters."

"The term total loss in insurance does not necessarily mean that the ship and goods shall have totally perished, as where both go to the bottom. A *constructive* total loss takes place when the subject, whether ship or goods, is not wholly destroyed, but its destruction is rendered highly probable, and its recovery, though not yet impossible, exceedingly doubtful. If such a loss takes place, the insured may abandon the ship or cargo to the under-

Warranty.

Convoy.

Implied warranties.

Abandonment.

writers, and claim from them as for a total loss under the policy. The very principle of indemnity, said Lord Abinger in the case of *Roux v. Salvador*, 3 Bing. 286, 287, requires that he should make a cession of all his right to recovery, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures at his own cost for realising or increasing that value. Of course, there is no room for such abandonment when the ship and goods have entirely perished; or where, as in the case of a hostile capture and being carried into a hostile port, they are placed beyond the hope of recovery."

"It sometimes, however, is a question whether the case is one of absolute total loss, not requiring abandonment, or only of constructive total loss, which does require abandonment. Thus, in *Cambridge v. Anderton*, 2 B. & C. 691, a timber-laden ship struck on the rocks in the St. Lawrence, and on being examined she was found to be so damaged that although still retaining the form of a ship, she was only saved from going to pieces by the timber which formed the cargo; and, in the judgment of surveyors, the expense of getting her off the rocks and repairing her would exceed her value when repaired. The question then arose, whether this could be considered as a case of absolute total loss? and this important principle was laid down by Lord Tenterden—'If the jury are of opinion that this vessel could not be repaired at all, or that she could not be repaired without incurring an expense equal to or greater than her value, then I shall hold that although she may exist in the form of a vessel and be afterwards sold with her register, the plaintiff will be entitled to recover as for a total loss.' And afterwards when the case was decided in *Banco*, he said—'If the subject-matter of insurance remained a ship, it was not a total loss, but if it were reduced to a mere congeries of planks the vessel was a mere wreck; the name you may think fit to apply to it cannot alter the nature of the thing.'"

"The notice of abandonment may be given by any writing, such as a letter."

Effect of  
abandon-  
ment.

"An important distinction exists between the law of foreign jurists, including the American, and that of our own country, in this particular. In the foreign countries it is held that if the abandonment was a justifiable abandonment at the moment it was made, that is conclusive, and the right to recover is not affected by

any subsequent change, such as the arrival of the missing ship or the recovery of the goods."

"In England, and probably in Scotland, though I am not aware that the case has actually occurred, the law is different, and the rule, though doubted by Lord Eldon, must now be considered as established by a long and uniform course of decisions—viz., that even though the facts were such as to justify the assured in giving notice of abandonment at the time he did so, yet he cannot insist on such notice, and recover as for a total loss, if the thing insured be restored *before he commences his action* in such a state that he may be reasonably expected to take possession of it. Thus, according to our law, a notice of abandonment may or may not operate as an abandonment, according to the ultimate situation of the property intended to be abandoned." (c)

"The right of abandonment has been admitted to exist where there is a forcible dispossession, or ouster, of the owner of the ship, as in cases of capture; where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of embargoes and blockades; where there is a present total loss of the physical possession and use of the ship, as in cases of submersion; where there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired where the disaster occurs; and, *lastly*, where the injury is so extensive that by reason of it the ship is useless, and the repairs would exceed her value."

"1. Thus, in the case of capture, immediate notice of abandonment must be given, subject to the chance of the vessel being recaptured in good condition, which would extinguish the claim for a total loss."

"2. The same would be the case if the vessel be seized and carried off, and the owners deprived of her possession by the barratry of the master or crew."

"3. In the case of mere arrest or embargo, there is room for a distinction. If the embargo be temporary, merely obstructing for a time the voyage, this will not be held a sufficient ground of

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(c) Unless the notice has been accepted by the underwriters, in which case the abandonment is irrevocable, and the property of the ship is transferred to the underwriters, and carries with it any freight that may be earned, although it has been separately insured, and the owners cannot recover on the policy or freight (*Stewart v. Greenock Marine Insurance Co.*, *infra*).

abandonment. It is otherwise where it is apparent that the detention will be considerable."

"4. Where, by reason of the injury sustained, the ship is reduced to such a condition that a prudent owner, if uninsured and on the spot, would, in the exercise of the best judgment which could be formed on the subject, rather sell her as she lay than attempt to repair her, either because there is no reasonable probability of her being delivered from the peril at all, or because the expense of repairing her so as to be capable of keeping the sea as a ship again would exceed her value when repaired, the owner may treat the case as one of a total loss (see the *dicta* of Chief-Justice Tindal in *Soames v. Sugrue*, 4 C. & P. 284, and of Lord Tenterden in *Doyle v. Dallas*, 1 M. & R. 54)."

"The principle that a ship is properly abandoned if the expense of repairs would exceed the value when repaired, was affirmed in *Stewart v. Greenock Marine Insurance Company* (Jan. 13, 1846, 8 D. 323, aff. Sept. 1, 1848, 1 Macq. 328), with this addition, that in considering whether the vessel was worth repairing or not, the real value in the market after being repaired was to be looked to, irrespective altogether of the value put on the vessel in the policy."

Life assur-  
ance.

"In the contract of insurance on lives, one party undertakes to pay a given sum upon the happening of a particular event, such as the death of the other party or his attaining to a certain age, in consideration of a payment or a series of periodical payments termed premiums, to be paid by the party assured. It is thus a contract of mutual risks."

"Besides the legitimate objects which insurance was calculated to effect, it was found to be largely applied to the purposes of gaming and speculation."

"To meet such evils, the Act 14 Geo. III. c. 48 was passed, prohibiting all such insurances, except in cases where the persons insuring should have an interest in the life or death of the person insured. By § 3 it is further enacted, that in all cases where the insured hath interest in such life or lives, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the assured in such life or lives. The primary requisite, therefore, of a legal insurance is that the party insuring shall have a pecuniary interest in the life assured (*Halford v. Rymer*, 10 B. & C. 724). It has been decided that a parent has no insurable interest in the life of a child, but it may be doubted whether this strict principle would be applied if the father were

dependent on the son's exertions ; as where the son was making him an allowance for his support—for the reason of the rule does not seem in such a case to apply. It has been held that a wife has an insurable interest in her husband's life, which would seem to imply that in all cases where the survivor is dependent on the exertions or means of the party predeceasing, the insurance would be good (*Reid v. Royal Exchange Insurance Co.*, Peake Add. Ca. 70). Every one may of course insure his own life so as to make the insurance a provision for wife or family."

"A creditor has an insurable interest in the life of his debtor, as the chance of obtaining payment is considered to be lessened by the death of the latter (*Anderson v. Edie*, Park 640). He may either open a policy in his own name on the debtor's life, or the debtor may effect the policy and assign it to the creditor. But suppose that, after a creditor has effected an insurance on his debtor's life in security of a debt due to him, the debtor pays the debt—does the assurance fall, the interest to keep up the policy then ceasing? In *Godsall v. Boldero* (9 East. 72, 2 Smith's L. C. 237), proceeding on the doctrine that insurance is a mere contract of indemnity, it was found that the policy had fallen by the payment of the debt, since the object of keeping the creditor *indemnitis* had been secured."

"This view of the law, most inequitable in its results, has so little regulated the practice of offices that it has been universally rejected, and policies have been granted and paid without any inquiry as to the continued subsistence of the insurable interest. But further, in 1854 the question was reconsidered, and the decision in the case of *Godsall* overruled (*Dalby v. The India and London Life Assurance Society*, 15 C. B. 365). In this case Baron Park (Lord Wensleydale) denied the principle on which Lord Ellenborough had proceeded in *Godsall v. Boldero*—viz, that a policy of insurance on life was a mere contract of indemnity, as an entirely false analogy. 'The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life (meaning the premium), the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always, except where bonuses have been given by the

offices, the same on the other. The species of assurance in no way resemble a contract of indemnity.'"

"He proceeded (1) to show that at common law the contract would have been perfectly binding; and (2) that there was nothing against it in the statute 14 Geo. III. c. 48, when the third section of the act was rightly construed in connection with the first; and that the substance of the two, taken together, was that a party effecting an insurance upon the life of another was entitled to recover whatever amount of interest he had at the time of effecting an insurance, though that interest might partially or wholly cease at an after date; for if he had such interest originally, he was not wagering or gaming as at the date of the contract."

Conceal-  
ment and  
misrepresentation.

"Insurance being a contract in which the utmost good faith is required, every false representation, or even concealment of anything material as to health or habits, will vitiate the policy. It does not enter into the question how far the misrepresentation was important; it is enough that the statement was on any point untrue.<sup>(k)</sup> Further, the acts and statements of any agent making the insurance are those of his principal. I speak, of course, only as to the general law; for many offices, seeing the hardships which in many cases have resulted from holding that policies of insurance are voidable through innocent misrepresentation (as where statements have been made erroneously, but *bona fide*), have provided against such contingencies by adopting a rule, that after a limited period, generally four years, the policy shall be unchallengeable, except on proof of fraud. But as this regulation is by no means universal, the law generally must be laid down as stated—misrepresentation on any point voids the policy; because it is never possible to ascertain whether, if the real truth had been known, the policy would or would not have been granted; but where one person insures the life of another, the party whose life is insured, if applied to for information, is not, in giving it, the agent of the party insuring. The latter, therefore, is not bound by his statements, and, in the absence of any condition to that effect, or fraud on his part, will not suffer should they be false. His concealment, therefore, of a mortal disease known to

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(k) Whether representations imply warranty in regard to the subject of them has to be determined with reference to each contract. One policy may be void because of a representation being untrue in point of fact; another may be void only if the representation be untrue in the knowledge of the party making it (*Life Assurance of Scotland v. Foster*, Jan. 31, 1873, 11 Macph. 351).

himself will not void the policy if the existence of such disease were unknown to the party insured (*Hackman v. Fernie*, 3 M. & W. 505). In regard to concealment as distinguished from actual misrepresentation, the fact concealed must be a material one. Thus, the concealment of intemperate habits will void the policy (*Craig v. Ferrie*, 1 Car. & Moore 43). The concealment of the habit of opium eating, as being a form of intemperance, would have the same effect. But the only case in which that question occurred in the law of Scotland failed for want of proof (*Sir W. Forbes & Co. v. Edinburgh Life Assurance Co.*, March 9, 1832, 10 S. 451)."

"Policies of insurance almost invariably contain a clause providing that the policy shall be void if the assured shall commit suicide or die by duelling or by the hands of justice. This occurred in the case of the celebrated Fauntleroy, who had effected an insurance on his own life (*Amicable Society v. Bolland*, 1830, H. L., 4 Bligh's New Reports, 194). This clause, however, does not annul a policy effected by a third party on the life of the party guilty of the offence. And in almost all cases there is an exception in favour of policies which, though effected by the party assured, have been onerously assigned. But a trustee for creditors in bankruptcy is not regarded as an *onerous assignee* entitled to the protection of the clause. (1) Questions of difficulty have arisen as to the suicide clause, whether a person under the influence of insanity can commit suicide in the proper sense of the word, namely, a felonious and criminal taking away of life. In *Clift v. Schwabe* (3 C. B. 481), it was held that the words "commit suicide" did not necessarily mean a felonious intention, but simply meant shall *intentionally* kill himself; and therefore, that even a madman intending to destroy himself might commit suicide within the meaning of the policy." [See Bell's Prin. 523.]

"It has been made a question, Whether, when a creditor has assured the life of a debtor for a certain sum, or has got an assignation to policies effected by that debtor on his own life, and where *bonus* additions have been made to the sum in the policy—these bonuses will belong to the creditor or to the representatives of the party assured. In *Marquis of Queensberry v. Scottish Union Insurance Co.* (July 10, 1839, 1 D. 1203, aff. March 8, 1842, 1 Bell's App. 183), it was held, in reference to the whole circumstances of the transaction, that although an assignation of certain policies

(1) *Adamson's Trustees v. Scottish Provincial Assurance Co.*, Feb. 21, 1868, 6 Macph. 442.

to the company was *ex facie* out and out, yet, according to the true and manifest intention of the parties, the object of it was merely to reproduce to the company the sum which they had lent; that the absolute terms of the assignation might be restrained under the equitable powers of the Court within the limits of the true intent of the parties; and that any surplus recovered by the company belonged to the executors of the Marquis. (See *Shand v. Blaikie*, May 31, 1859, 21 D. 878)."

Fire Insur-  
ances.

"Insurances against fire are very much regulated by principles such as those that apply to other contracts of indemnity."

"It seems that the damage cannot be said to have arisen from fire if there be no actual ignition, as in heat arising from effervescence, or injury by the overheating of a flue. Considering the *bond fide* and liberal nature of the contract, one would have been disposed to think such cases fell fairly within the contract. But the rule seems to be otherwise within the operation of the rule; where there has been an actual fire are included damage done by the water applied in extinguishing the fire, damage in removing the furniture, and the expense of removal, or damage done by the falling of a wall on any property, which has been injured by a fire taking place on that of my neighbour."

"Of late various other forms of insurance have been introduced, such as insurances against the frauds of clerks and other officers of trust, and the consequent responsibilities of parties who have become cautioners for such parties. Courts of law generally decline to receive an insurance office as cautioner.<sup>(m)</sup> But the individual cautioner who actually engages, protects himself by insuring with some guarantee association that whatever sum he may be called on as cautioner to pay shall be repaid to him by the guarantee association in return for an annual premium paid by him."—MOIR.

#### TIT. IV.—OF THE DISSOLUTION OR EXTINCTION OF OBLIGATIONS.

Obligations  
are dissolved  
by imple-  
ment, *e.g.*,  
payment.

1. Obligations may be dissolved by *performance* or *implement*, *consent*, *compensation*, *novation*, and *confusion*.  
(1) By specific performance; thus, an obligation for a sum

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(m) *Burnet*, July 8, 1859, 21 D. 1197; *Donaldson*, July 16, 1860, 22 D. 1471.

of money is extinguished by payment. The creditor is not obliged to accept of payment by parts, unless where the sum is payable by different divisions. If a debtor in two or more separate bonds to the same creditor had made an indefinite payment, without ascribing it at the time to any one of the obligations, the payment was, by the Roman law, to be applied by the creditor as the debtor himself would have done (l. 1, *de solut.*, 46, 3); and consequently, to that debt which bore hardest upon him, or to which a penalty was adjoined (l. 3, 4, 5, *eod. t.*) By our law, which shows a more equal regard to the interest of the creditor and debtor, indefinite payments are applied,—(1) To interest, or to sums not bearing interest (*Duck v. Maxwell*, 1717, M. 6804). (2) To the sums that are least secured, if the debtor thereby incurs no rigorous penalty (*Paterson*, Jan. 1774, n.r.). (a) But (3) if this application be penal on the debtor, *e.g.*, by suffering the legal of an adjudication to expire, the payment will be so applied as to save the debtor from that forfeiture. Where one of the debts is secured by a cautioner, the other not, the application is to be so made *cæteris paribus*, that both creditor and cautioner may have equal justice done to them (*Duchess of Buccleuch v. Dougl.*, 1725, M. 6807). (b)

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(a) See *Forbes v. Innes*, 1739, M. 6813, 5 B. S. 690.

(b) These further limitations to the creditor's right to appropriate an indefinite payment may be added :—That he may not ascribe it to a disputed debt (*Bell's Pr.* 563); but where there has been a mutual understanding at the time of the payment, he may not appropriate it differently on emerging circumstances (*Bannatyne v. Brown's Trs.*, Feb. 26, 1825, 3 S. 407); that payments after sequestration cannot be applied otherwise than as dividends on the whole amount of debt (*M'Nee v. Balmano*, May 25, 1824, 3 S. 60, in H.L., Feb. 24, 1826, 2 W. & S. 7; *Allan v. Allan & Co.*, March 1, 1831, 9 S. 519). In the case of an account-current between two parties, where no specific arrangement is made at the time of payment, the law appropriates payments to the several debts in their order, setting the first item on the credit side against the first item on the debit side, and so on. Thus, if persons have been sureties for one of the parties to such a continuing account, and if, after the expiration of their guarantee or bond of caution the balance then due has once been extinguished by payments into the account, they will not be liable for any balance arising on subsequent transactions [*Devaynes v. Noble (Clayton's case)*, 1 Mer. 585, 3 Ross's L. C. 654; *Houston's Exrs. v. Speirs*, May 22, 1829, 3 W. &

Payment  
bonâ fide.

(3)

(4)

(5)

2. Payment made by the debtor upon a mistake in fact, to one whom he believed upon probable grounds to have the right of receiving payment, extinguishes the obligation, *e.g.*, payment to one who had been the creditor's factor, but whose factory was recalled without intimation to the debtor; or payment of rent by a tenant to the landlord from whom he had the lease, though such landlord has been, before the payment, divested in favour of a singular successor.(c) But payment made to one to whom the law denies the power of receiving it has not this effect; as, if a debtor, seized by letters of caption, should make payment to the messenger; for *ignorantia juris neminem excusat*. In all debts, the debtor, if he be not interpellated, may safely pay before the term, except in tack-duties or feu-duties, the payment whereof before the terms at which they are made payable is construed to be collusive in a question with a creditor of the landlord or superior (*L. Lauchope v. Clegborn's Tenants*, Feb. 28, 1628, M. 10,022). Payment is *in dubio* presumed by the voucher of the debt being in the hands of the debtor (*Chirographum apud debitorem repertum, præsumitur solutum.*)(d)

3. Obligations are extinguishable by the consent of the

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S. 392; *Christie v. Royal Bank*, May 17, 1839, 1 D. 745, aff. April 6, 1841, 2 Rob. 118; *Lang v. Brown*, Dec. 2, 1859, 22 D. 113].

(c) But payment of rent by a tenant to a landlord before the legal term of payment is deemed collusive in questions with the landlord's singular successors (*infra*, and Inst. iii. 4. 4; Bell's Pr. 562). This rule, however, does not operate in favour of the trustee on the landlord's sequestrated estate (*Davidson v. Boyd*, November 5, 1868, 7 Macph. 77), where its application to the individual creditors of the landlord is also doubted.

(d) In this and other cases of "presumed payment," the evidence for which must "be utterly irreconcilable with the idea that the debt is still due" (*Graham v. Veitch*, Dec. 18, 1823, 2 S. 594). The presumption here referred to yields to proof that the document of debt has come into the debtor's hands without payment of the debt. Such proof may be by parole where the debtor is alleged to have got possession by fraud or force (*Edward v. Fyfe*, June 26, 1823, 2 S. 431); but if the debtor is said to have obtained it from the creditor for a special purpose, not implying a discharge, the mode of proof will probably be restricted to writ or oath, in terms of the statute 1696, c. 25, as to trusts (see Dickson on Evid., § 952 *et seq.*)

creditor who, without full implement, or even any implement, may renounce the right constituted in his own favour. Though a discharge or acquittance, granted by one whom the debtor *bond fide* took for the creditor, but who was not, extinguishes the obligation if the satisfaction made by the debtor was real; yet, where it is imaginary, the discharge will not screen him from paying to the true creditor the debt that he had made no prior satisfaction for (*Homes v. Bonnar*, Dec. 14, 1661, M. 1788). In all debts which are constituted by writing,<sup>(e)</sup> the extinction, whether it be by specific performance, or bare consent, must be proved either by the oath of the creditor or by a discharge in writing; and the same solemnities which law requires in the obligation are necessary in the discharge. But where payment is made, not by the debtor himself, but by the creditor's intromission with the rents of the debtor's estate, or by delivery to him of goods in name of the debtor, such delivery or intromission, being *facti*, may be proved by witnesses, though the debt should have been not only constituted by writing but made real on the debtor's lands by adjudication.

Extinction of obligations by the creditor's consent.

(8)

Discharges of written obligations must be in writing;

(9)

but the creditor's intromission with rents may be proved by witnesses.

4. A discharge, though it should be general of all that the granter can demand, extends not to debts of an uncommon kind, which are not presumed to have been under the granter's eye; as obligations of warrandice not yet incurred, or of relief of debts not yet paid to the creditor (*Campbell v. Napier*, Jan. 23, 1678, M. 5035);<sup>(g)</sup> or for performing special facts (*Dalgarno v. L. Tolquhoun*, Nov. 19,

General discharges.

(9)

(e) In the Inst., § 8, it is said that an obligation constituted verbally may be extinguished by a verbal declaration of the creditor that he passes from it. But it is questionable whether, in regard to obligations of greater value than £100 Scots, parole proof of such a release is competent. On the contrary, it appears that such proof is admissible only where the constitution of an obligation, itself proveable by parole, and its extinction by payment or renunciation, as in a ready money sale, take place at the same time (Dickson on Evid., § 627; Bell's Pr. 565). The satisfaction of an obligation *ad factum praestandum* may be proved by parole (*infra*, iv. 2, 12; Inst. iv. 2, 21; Stair, iv. 43, 4), as in the analogous cases mentioned in the end of this section.

(g) *M'Taggart v. Jeffrey*, Nov. 28, 1828, 6 S. 641; rev. Nov. 24, 1830, 4 W. & S. 361.

1680, M. 5030). A general clause subjoined to the discharge of a special debt comprehends all debts of the same sort with that which is specially discharged, though they should be for greater sums [*Chappel (Talbot) v. Guidet*, June 29, 1705, M. 5027];<sup>(h)</sup> but does not extend to debts of a different sort, for the granter is presumed not to have had these in view.<sup>(i)</sup> This doctrine applies also to general assignations. In annual payments, as of rents, feu-duties, interest, &c., three consecutive discharges by the creditor of the yearly or termly duties presume the payment of all precedings. Two discharges by the ancestor and the third by the heir do not infer this presumption, if the heir was ignorant of the ancestor's discharges (*Gray v. Reid*, 1699, M. 11,399, 4 B. S. 466). And discharges by an administrator, as a factor, tutor, &c., presume only the payment of all preceding duties incurred during his administration. This presumption arises from repeating the discharges thrice successively; and so does not hold in the case of two discharges, though they should include the duties of three or more terms.<sup>(k)</sup>

Consecutive  
discharges  
of three  
terms' duties  
or interest.

(10)

(h) *Ewan v. Ewan's Trs.*, Jan. 15, 1824, 2 S. 612, rev. June 28, 1825, 2 W. & S. 595.

(i) Even debts of the same sort will not be extinguished by a general discharge where it is evident that they are not in the view of the granter; (*M. Tweeddale v. Hume*, May 26, 1848, 10 D. 1053; *Moon's Trs. v. Carmichael*, June 28, 1836, 14 S. 1026). Ignorance of the existence of the rights alleged to be discharged by general words operates to restrict their effect (*Greenock Banking Co. v. Smith*, July 17, 1844, 6 D. 1340; *Purdon v. Rowat's Trs.*, Dec. 19, 1856, 19 D. 256). But a more extensive construction is given to a discharge which is intended to be entirely general, e.g., to an insolvent on payment of composition (*Adam v. M'Dougal*, May 9, 1831, 9 S. 570; *British Linen Co. v. Esplin*, June 6, 1849, 11 D. 1104; *Whyte v. Knox*, May 26, 1858, 20 D. 970.)

(k) See *D. Buccleuch v. M'Turk*, June 25, 1845, 7 D. 927. Arrears of rent or interest constituted by bond, bill, or decree, subsist notwithstanding consecutive discharges for three posterior years (Inst. l. c.; *Patrick v. Watt*, March 8, 1859, 21 D. 637).

Lawyers'  
and Physi-  
cians' fees  
presumed to  
be paid at  
the time.

"There is a presumption of payment of physicians' and lawyers' fees at the time. But in the case of the former this presumption does not hold during the deathbed sickness; embracing, it would seem, a period of sixty days. But if the medical man also supplies the medicines, a different rule has been applied. Thus, in the case of *Flint v. Alexander*, 1795, M. 11,422, Flint, a physician, having brought his action both for attendance

5. Where the same person is both creditor and debtor to another, the mutual obligations, if they are for equal sums, are extinguished by compensation; if for unequal, still the lesser obligation is extinguished, and the greater diminished as far as the concurrence of debt and credit goes. Compensation was not received with us but by way of action till 1592, c. 141, which first admitted compensation by way of exception. It had, by the *jus novum* of the Romans, its effect *ipso jure* (*l. ult. C. de compens.*, 4, 31), and consequently was drawn back to the period of concurrence, and had its operation from the necessity of law, without regard to the intendment of parties; but the chief effects given to it by our law begin from the period of pleading it in judgment. Hence compensation was not sustained upon a debt prescribed at pleading it, though it was subsisting at the time of concurrence (*Carmichael v. Carmichael*, 1719, M. 2677).<sup>(1)</sup> Hence, also, one was allowed to plead compensation on that debt of the two that was worst secured, though the first concurrence was made by the other (*Maxwell v. McCulloch*, Nov. 15, 1738, M. 2550; see also *Haldane v. D. of Douglas*, 1753, M. 2690). Yet we have, from equity, given this effect to compensation, that it stops the currency of interest on both sides downwards from the time of concurrence.

Extinction  
by compen-  
sation.

(11, 12)

It does not  
operate *ipso*  
*jure* by our  
law;

yet it stops  
the currency  
of interest.

6. To found compensation—(1) Each of the parties must

Requisites of  
compensa-  
tion.

and medicines, and being met by the plea of presumed payment, answered that this rule might apply where there was a complete separation between the apothecary and the physician, but not where medicines and attendance were furnished by the same person; that the presumption, if such there were, must yield to proof, and the fact that, as in this case, the medicines were admittedly unpaid, afforded of itself conclusive evidence that the claim for attendance was also unpaid. The Court found that, in the circumstances, the pursuer was entitled to make a reasonable charge for attendance during the whole illness.—*MOIR*. Payment is also presumed on the ground of taciturnity, a plea which is not founded by mere silence or lapse of time, but only arises where the whole circumstances, coupled with long silence, lead to the reasonable inference of payment, satisfaction, or abandonment (*Cullen v. Wemyss*, Nov. 16, 1828, 1 D. 32; *Moncreiff v. Waugh*, Jan. 11, 1859, 21 D. 216). See *infra*, b. iii. t. vii., § 11.

(13-15)

(1) But a debt which has fallen under one of the short prescriptions may be at once verified upon reference to oath, so as to found compensation (*Bell's Pr.*, 574, Com. ii. 128).

be debtor and creditor at the same time. A debtor, therefore, cannot plead compensation against his creditor's assignee upon a debt due by the cedent, which the person compensating had not acquired till the assignee's right was completed by intimation (*Ferguson v. More*, 1665, M. 2652). (2) Each of them must be debtor and creditor in his own right. Hence a tutor cannot compensate a debt properly due by himself with a sum for which he is creditor *tutorio nomine*.(m) (3) The mutual debts must be of the same quality. Hence, a sum of money cannot be compensated with a quantity of corns; because, till the prices are fixed at which the corns are to be converted into money, the two debts are incommensurable. Hence, also, a debt already payable, on which the creditor may have immediate execution, cannot in strictness be compensated with a debt the term of payment whereof is not yet come.(n) By a similar rule, a moveable sum cannot be compensated with an heritable debt in the old form, bearing requisition; because, before requisition, the estate burdened is debtor more properly than the proprietor (*Home v. Home*, Nov. 12, 1675, M. 2633).(o)

The debts  
must be of  
the same  
quality,

(m) Or as a trustee, administrator, or factor. "On the same principle, there will be no compensation between the debt due by an executor and a debt due to the estate, unless the executor has the sole interest in the estate; or unless, so far as equity may interpose, to the extent of any residuary interest in the executor" (Bell's Com., ii. 131).

Equitable  
restrictions.

(n) This rule applies strictly only where both parties are solvent; for if one become bankrupt, the other may plead compensation on a future or contingent debt (Bell's Com., ii. 128). "But while compensation frequently operates a preference in favour of one creditor over another creditor of a bankrupt, it will always be restrained by equity where it would lead to any unjust result. Thus, if a person were to purchase a debt due by his creditor, after the death or bankruptcy of such creditor, for the purpose of pleading compensation, he would not be permitted to maintain this plea (*Crauford v. Earl of Murray*, Feb. 8, 1662, M. 2613; *Cauvin v. Robertson*, 1783, M. 2581). In all such cases the rule is, that the assignee can be in no better situation than his cedent, and can make no claim that he could not have done. In like manner, an arrestee who should take an assignation to a debt, so as to found a plea of compensation after an arrestment in his hands, is barred from advancing such a plea (*Maclure v. Brown*, July 19, 1678, M. 2617)."—MOIR.

(o) But a heritable bond in the modern form may compensate a move-

7. Lastly, compensation cannot be admitted where the mutual debts are not clearly ascertained, either by a written obligation, the sentence of a judge, or the oath of a party. Where this requires but a short discussion, sentence for the pursuer is delayed for some time *ex æquitate*, that the defender may make good his ground of compensation, according to the rule, *Quod statim liquidari potest pro jam liquido habetur* (*Macdonald v. Agnew*, July 31, 1707, M. 2568).<sup>(p)</sup> Where a debt for fungibles is ascertained in money by the sentence of a judge, the compensation can have no effect farther back than the liquidation; because, before sentence, the debts were incommensurable. But where a debt for a sum of money is, in the course of a suit, constituted by the oath of the debtor, the compensation, after it is admitted by the judge, operates *retro*, in so far as concerns the currency of interest, to the time that, by the party's acknowledgment, the debt became due; for in this case the debtor's oath is not what creates the debt, or makes it liquid, it only declares that such a liquid sum was truly due before (*Watson v. Cunningham*, Dec. 4, 1675, M. 2684). By the above quoted statute, 1592, compensation cannot be offered after decree, either by way of suspension or reduction; but if it is pleaded once, and unjustly repelled, it may be again insisted on,

and clearly  
ascertained.

(16)

Compensation  
is not  
admitted  
after decree.

(19)

able bond, the difference in the security making none in the quality of the debt (Inst. l. c.)

(p) "It has been held that where a claim of freight is made for the carriage of goods, it may be compensated by a claim of damages for injury done to these goods by insufficient stowage, though the amount of damage is not yet ascertained, while the amount of freight is fixed (*Taylor v. Forbes*, Dec. 2, 1830, 9 S. 113). This decision, it appears to me, can only be justified on the footing of mutual contract relating to the same subject matter."—MOIR. But see *M'Donald v. Thomson*, Feb. 23, 1843, 5 D. 719; in *Scottish North-Eastern Ry. Co. v. Napier*, March 10, 1859, 21 D. 700, it seems to be admitted that an illiquid claim of damages may be allowed to found a plea of compensation where it arises out of the very contract sued on—the case which occurred in *Taylor v. Forbes*; *Burt v. Bell*, Nov. 6, 1861, 24 D. 13; and in *Johnstone v. Robertson*, March 1, 1861, 23 D. 646, claims arising on mutual contract were held to be quite independent of the Statute 1592, c. 141. The bankruptcy of one of the parties gives the other a right to retain till an illiquid debt be constituted (Bell's Pr. 573; *infra*, § 8).

either by suspension or reduction. Decrees in absence are not decrees in the sense of this Act, whether they are pronounced by an inferior judge (*E. Marischal v. Bray*, June 18, 1662, M. 2639, 12,221), or even by the Court of Session, if they be afterwards turned into a libel (*Wright v. Sheill*, July 25, 1676, M. 2640).(q)

Retention.

(20)

8. The right of retention, which bears a near resemblance to compensation, is chiefly competent where the mutual debts, not being liquid, cannot be the ground of compensation; and it is sometimes admitted *ex æquitate* in liquid debts where compensation is excluded by statute. Thus, though compensation cannot be pleaded after decree, either against a creditor or his assignee, yet if the original creditor should become bankrupt, the debtor, even after decree, may retain against the assignee till he gives security for satisfying the debtor's claim against the cedent (*Maclarens v. Bisset*, Feb. 18, 1736, M. 2646). This right is frequently founded in the expense disbursed, or work employed on the subject retained, and so arises from the mutual obligations incumbent on the parties, *e.g.*, retention by a writer of the writings belonging to his client till payment of his account;(s) or retention by a tradesman of any piece of work till payment of the sum expended on it, or the price of the workmanship.(t) But retention may be sustained though the debt

What are  
the ordinary  
subjects of  
retention.

(21)

(q) "Even decrees in absence are by our practice considered as decrees in the sense of this statute: and consequently have the effect to cut off the plea of compensation, whether pronounced by the Court of Session or by an inferior judge, if the decrees themselves have not been set aside on some legal nullity, or have been turned into a libel, or proceeded on a general process against debtors." (Inst. l. c.; see Bell's Pr. 575; *Cunningham & Co. v. Wilson & Co.*, Jan. 17, 1809, F.C.)

(s) See above, b. iii. t. l. § 13.

Special  
retention.

(t) This is the ordinary case of *special* retention, which is "the right of withholding or retaining property or goods which are in any one's possession under a contract till indemnified for the labour or money expended on them" (Bell's Com. ii. 91); or more generally, "as a security for the fulfilment of the counterpart" (Bell's Pr. 1411.) It is well-fixed that such a right of special retention does not (without special agreement, general usage in the district, or as between the parties, converting it into a right of general retention) extend beyond debts originating in the particular contract out of which the possession has arisen (*Harper v. Faulds*, 1791,

due to him who claims it does not arise from the nature of the obligation by which he is debtor. Thus, a factor on a land estate may retain the sums levied by him in consequence of his factory, not only till he be paid off the disbursements made on occasion of such estate, but also till he be discharged from the separate engagements he may have entered into on his constituent's account: and that notwithstanding any diligence that may be used by the creditors of the constituent to affect the balance due by the factor to the common debtor (*Stark*, n.r., Nov. 1729).

9. Obligations are dissolved by novation, whereby one obligation is changed into another, without changing either the debtor or creditor. The first obligation being thereby extinguished, the cautioners in it are loosed, and all its consequences discharged; so that the debtor remains bound only by the last. As a creditor to whom a right is once constituted ought not to loose it by implication, novation is not easily presumed, and the new obligation is construed to be merely corroborative of the old; but where the second obligation expressly bears to be in satisfaction of the first, these words must necessarily be explained into novation (*Chisholm v. Gordon*, Dec. 6, 1632, M. 16,472.(v) Where the creditor

Extinction  
by novation.

(22)

Novation is  
not pre-  
sumed.

Extinction  
by delega-  
tion;

M. 2666, Bell's 8vo Ca. 440; *Aberdeen v. Smith & Paterson*, Hume 127; *Brown v. Somerville*, June 13, 1844, 6 D. 1267; *Laurie v. Denny's Trs.*, Feb. 17, 1853, 15 D. 404; *Smiths v. Aikmans*, Dec. 24, 1859, 22 D. 344). The general retention treated of in the latter part of the section is "a right to withhold or detain the property of another in respect of any debt which happens to be due, or for a general balance of account arising on a particular train of employment" (Bell's Com. ii. 91). This right may arise from agreement or usage. It has been admitted from the force of usage in a few trades and manufactures in England; but the most important cases in which it has been recognised are law-agent's retention (*supra* iii. 1-13), and the factor's retention for the balance on his general account (including advances made to or for his principal) of all goods of the principal in his possession as factor when the demand for payment is made. It extends to the price of goods sold by the factor, and paid or payable to him (*Kruger v. Wilcox*, Tud. L. C. 676; Bell's Pr., 1445 *et seq.*). But there is no such retention for debts due to the factor arising out of other than factorial transactions (*Dickson v. Stansfeld*, 10 C. B. 398; *Miller & Paterson v. McNaiv*, July 6, 1852, 14 D. 955).

General  
retention.

(v) Where the old security is delivered up, novation takes place

accepts of a new debtor in place of the former, who is discharged, this method of extinction is called delegation.

by confusion.

(23-26)

How far it takes place when the right devolves on the cautioner;

It does not take place in debts purchased by the debtor's apparent heir.

Right to estate vests in him by survivorship.

Heirs of entail.

10. Obligations are extinguished *confusione* where the debt and credit meet in the same person, either by succession or singular title, *e.g.*, when the debtor succeeds to the creditor, or the creditor to the debtor, or a stranger to both (l. 21, § 1, *de liber. leg.*, 34, 3); for one cannot be debtor to himself. If he on whom the right of the creditor devolves was only liable as cautioner, the accessory obligation is extinguished; because the debtor and creditor therein come to be the same person; but the principal obligation against the proper debtor subsists. And, by the same reason, though it be true that an heir is liable *in suo ordine* for his ancestor's moveable debts, yet a moveable debt due to one who afterwards succeeds as heir to the debtor is not extinguished *confusione*, but subsists against the executor who is primarily liable in that sort of debts (iii. 9, § 28). Debts or adjudications purchased by an apparent heir, affecting the estate of the ancestor, are not extinguished *confusione*; for the heir while he is not entered does not represent the debtor, nor fill his place. And though possession upon such rights subjects him to a passive title (iii. 8, § 39), yet that statutory penalty was enacted merely in favour of creditors, but does not create a proper representation, nor annul the diligences so acquired, which, therefore, are effectual to singular successors (*Murray v. Neilson*, 1728, M. 3043). If the succession from which the *confusio* arises happens afterwards to be divided, so as the debtor and creditor come again to be different persons, the *confusio* does not produce an extinction, but only a temporary suspension of the debt (Stair, i. 18, § 9). Hence, an assignation in favour of an heir of tailzie, and his heirs whatsoever, of a debt affecting the entailed estate, suspends the debt only during the life of such heir; but it may revive after his death in the person of his heir-at-law against the heir of tailzie.(y)

(*Stevenson v. Duncan*, 1805, Hume, 245; *Black v. Cuthbertson*, Dec. 15, 1814, F. C.)

(y) *Crawford v. Hotchkis*, March 11, 1809, F.C.; *Lawrie v. Donald*, Dec. 7, 1830, 9 S. 147; *Welsh v. Barstow*, Feb. 11, 1837, 15 S. 537. In such cases there is no proper *confusio* of the full right and the full obliga-

## TIT. V.—OF ASSIGNATIONS.

1. Heritable rights, when they are clothed with infest-  
 ment, are transmitted by disposition, which is a writing  
 containing procuratory of resignation and precept of seisin;  
 but those which either require no seisin, as servitudes,  
 patronages, reversions, &c.,<sup>(2)</sup> or on which seisin has not ac-  
 tually followed (as to which, see ii. 7, § 13), and also all  
 moveable rights are transmissible by simple assignation. He  
 who grants the assignation is called the cedent; and he who  
 receives it the assignee or cessionary. If the assignee con-  
 vey his right to a third person it is called a translation; and  
 if he assigns it back to the cedent, a retrocession. Certain  
 rights are, from the uses to which they are destined, in-  
 capable of transmission, as alimentary rights.<sup>(a)</sup> Others

Rights are  
 transmitted  
 either by  
 disposition,

(1, 2)

or assigna-  
 tion.

What rights  
 are not as-  
 signable.

tion. "The heir is creditor in the bond in fee simple and absolutely;  
 whereas he is not debtor in the bond in the same unlimited character,  
 but, on the contrary, only in a limited character, and with a right of re-  
 lief against succeeding heirs of entail. Hence the proper elements of  
*confusio* do not exist as to the principal sum in the bond, although the  
 principle operates immediate extinction, and not a mere suspension of  
 liability as to each term's interest as it falls due."—*Per* Lord Ivory in *L.*  
*Blantyre v. Dunn*, July 1, 1858, 20 D. 1188. In short, wherever a debtor  
 becoming creditor in an obligation has really an interest to keep it up as  
 a separate right in his person, he is entitled to do so by taking an assign-  
 ation to it (Bell's Pr. 580; *Fleming v. Imrie*, Feb. 11, 1868, 6 Macph.  
 363); but he must take the proper means. Thus, where an heir of entail  
 once becomes full debtor, or debtor without relief, as by incurring liability  
 as universal representative of the entailor, he cannot afterwards take  
 measures to separate his predecessor's debts in order to keep them up  
 against subsequent heirs of entail, confusion having operated (*Forbes &*  
*Co. v. Duncan*, 1802, M. App. "Tailzie," 10; *Codrington v. Johnstone*,  
 March 31, 1824, 2 S. App. 118; *D. Roxburghe v. Wauchope*, March 9,  
 1825, 1 W. & S. 41).

(2) Personal rights to land. There is a statutory form for transfer-  
 ring heritable securities by assignation, which must be recorded in the  
 Register of Sasines (31 & 32 Vict. c. 101, § 124, sched. G.G.).

(a) See below, b. iii. 6, 4. But arrears of alimentary funds appear to  
 be assignable in payment of debts of a proper alimentary character  
 incurred by the cedent (*Waddell v. Waddell*, Nov. 26, 1836, 15 S. 161);  
 but only of the proper debts of the person in right of the fund (*Rennie v.*  
*Ritchie*, Dec. 8, 1840, 13 Jur. 73, rev. April 25, 1845, 4 Bell's App. 221).

cannot be assigned by the person vested in them without special powers given to him, as tacks (ii. 6, § 13), reversions (ii. 8, § 4), &c. The transmission of a third sort is not presumed to be intended without an express conveyance; as of paraphernal goods, which are so proper to the wife that a general assignation by her to her husband of all that did or should belong to her at her decease does not comprehend them (*Paton*, n.r., Dec. 1733). A liferent is by its nature incapable of a proper transmission, but its profits may be assigned while it subsists (ii. 9, § 24).

Intimation  
of assigna-  
tions.

(3)

2. Assignations must not only be delivered to the assignee (*Lady Hisleside v. Baillie*, 1685, M. 11,496),<sup>(b)</sup> but intimated by him to the debtor. Intimations have been probably first introduced merely as an interpellation or prohibition to the debtor that he should not pay to the original creditor; but they came afterwards to be considered as likewise necessary for completing the conveyance (*Wallace v. Edgar*, Jan. 22, 1663, M. 837), insomuch that, in a competition between two assignations, the last, if first intimated, is preferred. Hence, if we shall suppose a debt assigned to one who has neglected to intimate his right during the cedent's life, any person who shall, upon the cedent's death, confirm the debt assigned, as executor-creditor to the deceased, is preferable to such assignee.

What noti-  
fication is  
equivalent to  
intimation.

(4)

3. Though regular intimation to the debtor is made by an instrument taken in the hands of a notary by the assignee or his procurator,<sup>(c)</sup> yet the law admits equipollences

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(b) On the authority of *M'Lurg v. Blackwood*, 1680, M. 845, which appears to be a more authoritative decision than that cited, Prof. Bell says:—"Assignation is completed by intimation, even though the deed of assignation should not itself be delivered" (Prin. 1462; see Com. ii. 16). As it was necessary under the former law to produce the assignation at intimation (*Watson v. Monro*, 1714, M. 3687), intimation was implied delivery where actual delivery had not taken place before.

(c) By the transmission of Moveable Property Act, 1862 (25 & 26 Vict. c. 85, § 2) an assignation is validly intimated by a notary-public delivering a certified copy to the debtor, the evidence of which is the notary's certificate in a statutory form; or by transmission by the creditor of a certified copy by post to the debtor, whose written acknowledgment of receipt is sufficient evidence. Under the previous law a written ac-

where the notice of the assignment given to the debtor is equally strong. Thus, a charge upon letters of horning at the assignee's instance, or suit brought by him against the debtor, supplies the want of intimation; these being judicial acts, which expose the conveyance to the eyes both of the judge and of the debtor; or the debtor's promise of payment by writing(*d*) to the assignee, because that is in effect a corroborating of the original debt. The assignee's possession of the right, by entering into payment of the rents or interest, is also equal to an intimation; for it imports not only notice to the debtor, but his actual compliance. Thus, an assignation of a tack, or of the rents and profits of lands, is perfected by the assignee's possessing the ground, or levying the rents; and the assignation of a bond, by the debtor's payment of interest to the assignee. Assignations to assignable reversions are completed by their registration in the Register of Reversions, which was instituted for the special purpose of publishing such rights with their conveyances (*Begg v. Begg*, Dec. 5, 1665, M. 6304);(*e*) but the registration of assignments of personal rights, as bonds, contracts, &c.,

Process or charge by the assignee to the debtor.

Possession by the assignee.

Registration of reversions in the proper record.

knowledge was also sufficient, and, if holograph, it has the unusual privilege of proving its own date (*supra*, p. 310). In the case of a corporation, intimation ought to be made to the treasurer (*Keir v. Menzies' Crs.*, 1739, M. 738, 850); or, in the case of an incorporated bank, to the chief officer at the head-office, and also to the agent at a branch where the money is actually lying (Bell's Lect. on Conv. 299). In the case of a company registered under the Companies Act, 1862 (§ 62), it may be made by leaving the intimation, or sending it by post addressed to the company at their registered office; in the case of railway companies, in the same way, at the principal office, or personally to the secretary, or if there be no secretary to any one director (8 Vict. c. 17, § 117; 8 & 9 Vict. c. 33, § 130). In the case of ordinary trading companies, intimation ought to be made either to all the partners, or to a manager formally appointed, if there be one; it is not enough to intimate to one who is *de facto* managing partner (*Hill v. Lindsay*, Feb. 7, 1846, 8 D. 472).

Insurance companies.

(*d*) In the Inst. l. c., it is said that even a verbal promise of payment upon a communing serves for intimation; but this has been much doubted; and even if it were correct, the proof of it must be by writ or oath (Bell's Com. ii. 18; *Horne & Elphinstone v. Murray*, 1674, M. 863).

(*e*) *Edmond v. Gordon*, Nov. 16, 1855, 18 D. 47, aff. Feb. 26, 1858, 3 Macq. 116.

does not supply the want of intimation ; because, as to these, our records were not intended for publication, but merely for conservation and diligence.(g) The debtor's private knowledge of the assignment is not sustained as intimation (*L. Westerau v. Williamson*, March 14, 1626, M. 859) ; since it imports neither publication nor possession on the part of the assignee.(h)

In what cases notification is not necessary.

(6)

Judicial and legal conveyances need no intimation.

(7)

4. Certain conveyances need no intimation ;—(1) Indorsements of bills of exchange ; for these are not to be fettered with forms introduced by the laws of particular states. (2) Bank-notes are fully conveyed by the bare delivery of them ; for, as they are payable to the bearer, their property must pass with their possession. (3) Adjudication (which is a judicial conveyance) and marriage (which is a legal one) carry the full right of the subjects thereby conveyed without intimation (*Stair*, iii. 13, § 14) ; nevertheless, as there is nothing in these conveyances which can of themselves put the debtor *in mald fide*, he is therefore *in tuto* to pay to the wife or to the original creditor in the debt adjudged till the marriage or adjudication be notified to him.(i) Assignments

(g) *Tod's Trs. v. Wilson*, July 20, 1869, 7 Macph. 1100.

(h) But private knowledge, though ineffectual as regards third parties, is, if legitimately proved, a sufficient interpellation to the debtor in a question between him and the assignee (*Inst. l. c.* ; *Bell's Pr.* 1465 ; *Leith v. Garden*, 1703, M. 865 ; *Dicksons v. Trotter*, 1776, M. 873, Hailes, 675). Intimation may be made without production of the assignment or a copy of it, by a letter setting forth the assignment in plain and distinct terms, provided it be followed by an answer acknowledging the debt (*Wallace v. Davies*, May 27, 1853, 15 D. 688). Notice to a factor, with entry in the debtor's books, has been sustained as an equipollent of intimation (*E. Aberdeen v. E. March*, April 9, 1730, Cr. St. & Pat. 40) ; as also in the case of an assignment of shares in a public company, the assignee's attending and voting at a meeting of the partners in virtue of the assignment (*Hill v. Lindsay*, Nov. 12, 1847, 10 D. 78).

(i) So, if a debtor, in ignorance of the sequestration of the creditor (which is also a legal assignation, 19 & 20 Vict. c. 79, § 102), have paid his debt *in bond fide* to the bankrupt, he is not obliged to pay it a second time to the trustee (19 & 20 Vict. c. 79, § 111). An assignation by a wife (though not intimated) before her marriage, is preferable to the claims of the creditors of the husband, claiming under the legal assignation of the marriage (*Inst. l. c.* ; *Till v. Jamiesons*, 1763, M. 2858 ; see

of moveable subjects, though they be intimated, if they are made *retentâ possessione* (the cedent retaining the possession), cannot hurt the cedent's creditors; for such rights are presumed in all questions with creditors to be collusive, and granted in trust for the cedent himself.(k)

5. An assignation carries to the assignee the whole right of the subject conveyed as it was in the cedent; and consequently, he may use diligence either in the cedent's name, while he is alive, or in his own: but letters of diligence which have been issued in name of the cedent cannot be executed by the messenger in the assignee's name; for messengers have no power to judge of the import of transmissions, and are confined in their executions to the will of the letters (*Steuart v. Hay*, June 11, 1745, M. 834, Elch. "Assignment" 6).(l). Where a right is assigned simply in trust, the nature of the trust must determine the effects of the conveyance: if the declared purpose of the trust discovers an intention in the granter that the trustee shall have full power over the subject, he may use all acts of property; but if it is granted for a special purpose, *e.g.*, to do diligence, the powers of the trustee, though not limited in the right, ought to go no farther.

Effects of  
assignation.  
(8)

6. After an assignation is intimated, the debtor cannot prove payment or compensation by the oath of the cedent, who has no longer any interest in the debt, unless the matter has

The cedent's  
oath cannot  
hurt the as-  
signee.

(9, 10)

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Bell's Com. ii. 18). Intimation is not necessary where the assignee is himself the debtor or party to whom it should be given (*Russell v. E. Breadalbane*, July 3, 1827, 5 S. 891, aff. April 4, 1831, 5 W. & S. 256); as in the assignations of a tack of teinds to the heritor (*Montgomery v. Montgomery*, 1673, M. 841; *E. Argyle v. M'Donald*, 1676, M. 842). Intimation to one of several co-obligants completes an assignation, but does not interpel the debtors who have not got notice from paying to the cedent (Inst. iii. 5, 5; *supra*, p. 428, note (c), *ad fin.*).

(k) See above, b. ii. 1, 10, 16 (*Brown v. Fleming*, Dec. 19, 1850, 13 D. 373; *Hamilton v. Western Bank*, Dec. 13, 1856, 19 D. 152; see *Nat. Bank v. Forbes*, Dec. 3, 1858, 21 D. 79, 86; *Mackinnon v. Nanson & Co.*, July 2, 1868, 6 Macph. 974).

(l) The assignee may get a new warrant to charge and arrest in his own name by producing the extract registered bond and assignation in the Bill Chamber (1 & 2 Vict. c. 114, § 7).

If the assignation be onerous.

been made litigious by an action commenced prior to the intimation; but the debtor may refer to the oath of the assignee, who is in the right of the debt, that the assignment was gratuitous, or in trust for the cedent: either of which being proved, the oath of the cedent will affect the assignee. If the assignation be in part onerous and in part gratuitous, the cedent's oath is good against the assignee only in so far as his right is gratuitous (*Steil v. L. Orbiston*, Feb. 25, 1679, M. 8647). All defences competent against the original creditor in a moveable debt, which can be proved otherwise than by his oath, continue relevant against even an onerous assignee, whose right can be no better than that of his author, and must therefore remain affected with all the burdens which attended it in the author's person. See this question discussed in the case of Mutual Contracts (Stair i. 10, § 16),<sup>(m)</sup> and in the case of Personal Rights of Lands (Stair iii. 1, § 21.)

#### TIT. VI.—OF ARRESTMENTS AND POINDINGS.

Arrestment.  
(2)

Common debtor.

1. The diligences whereby a creditor may affect his debtor's moveable subjects are Arrestment<sup>(a)</sup> and Poining. By arrestment is sometimes meant the securing of a criminal's person till trial (1487, c. 99); but as it is understood in the rubric of this title it is the order of a judge, by which he who is debtor in a moveable obligation to the arrester's debtor is prohibited to make payment or delivery till the debt due to the arrester be paid or secured. The arrester's debtor is usually called the common debtor: because, where

<sup>(m)</sup> The doctrine of the Inst. l. c., and of Stair in the passage referred to, is overruled, and that of the text suffers an exception, by the cases of *Somerville v. Redfearn*, 1813, 1 Dow's Ap. 50, 5 Pat. 707, and *Gordon v. Cheyne*, Feb. 5, 1824, 2 S. 675. It was there fixed that, though a trustee for creditors must take rights vested in the bankrupt subject to all latent trusts in his person (*tantum et tale*), the onerous assignee under an intimated special assignation is not affected by latent exceptions personal to the cedent (see *Burns v. Lawrie's Tr.*, July 7, 1840, 2 D. 1348). In regard to personal rights to land, see Bell's Com. ii. 282.

<sup>(a)</sup> As to arrestment *jurisdictionis fundandæ causâ*, which is not strictly a diligence, see *ante*, i. 2, § 11.

there are two or more competing creditors, he is debtor to all of them. The person in whose hands the diligence is used is styled the arrestee.(b)

2. Arrestment may be laid on by the authority either of the Supreme Court or of an inferior judge. In the first case it proceeds either upon special letters of arrestment, or on a warrant contained in letters of horning; and it must be executed by a messenger. The warrants granted by inferior judges are called precepts of arrestment; and they are executed by the officer proper to the Court.(c) Where the debtor to the common debtor is a pupil, arrestment is properly used in the hands of the tutor, as the pupil's administrator. This doctrine may perhaps extend to other general administrators, as commissioners, &c. But arrestment used in the hands of a factor or steward cannot found an action of forthcoming without calling the constituent (*Donaldson v. Cockburn*, Jan. 18, 1709, M. 735.(d) Where the debtor to

The warrant  
of arrest-  
ment;

(3)

in whose  
hands it  
may be  
used;

(4)

(5)

(b) A person may arrest or poind in his own hands goods which he has sold but has not delivered, at any time before a second or sub-sale of them has been intimated to him (19 & 20 Vict. c. 60, § 3. See *Wyper v. Harveys*, Feb. 27, 1861, 23 D. 606), where a seller who had arrested in his own hands was held preferable to a second purchaser, who had paid the price but had not intimated his purchase to the first seller prior to the arrestment. "Formerly a party selling goods to another who was indebted to him might retain the goods not only till payment of the price, but till payment of all claims against the purchaser, founded on prior obligations. But § 2 of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 60, enacted that, if the first purchaser re-sold, the original seller should not be entitled to retain the goods sold for any prior debt of the original purchaser, but only till the purchase price was paid. The seller being thus prevented from retaining the goods sold in respect of debts or obligations having no connection with the sale of the goods, to empower the seller to arrest or poind for such debts was merely to place him on an equal footing with the other creditors of the purchaser."—*MOIR*.

(c) A warrant to arrest and poind is now inserted in extract-decrees of the Supreme and Sheriff Courts, and in extracts of registered obligations (1 & 2 Vict. c. 114, §§ 1, 2, 9); but the old forms are still competent. Arrestment does not require to be preceded by a charge (*Weir v. Falconer*, Feb. 2, 1814, F.C.) As to Exchequer Processes, see 19 & 20 Vict. c. 36, § 28.

(d) The validity of an arrestment in the hands of a factor or steward for the person indebted to the common debtor, which is here assumed, is

the common debtor is a corporation, arrestment must be used in the hands of the directors or treasurer, who represent the whole body (*Keir v. Creditors of Menzies*, Jan. 10, 1739, M. 738). Arrestment when it is used in the hands of the debtor himself, is inept, for that diligence is intended only as a restraint upon third parties.(e)

upon what  
debts it may  
proceed.

(10)

3. All debts in which one is personally bound, though they should be heritably secured, are grounds upon which the creditor may arrest the moveable estate belonging to his debtor; for every creditor, whatever the nature of his debt may be, ought to have the whole of his debtor's estate subject to his diligence. Arrestment may proceed on a debt the term of payment whereof is not yet come, in case the debtor be *vergens ad inopiam* (*Lord Pitmedden v. Patersons*, July 16, 1678, M. 813). If a debt be not yet constituted by decree or registration, the creditor may raise and execute a summons against his debtor for payment, on which pending action arrestment may be used (in the same manner as inhibition; ii. 11, § 3), which is called arrestment upon a dependence.(g) If one's ground of credit be for the perform-

Arrestment  
upon a de-  
pendence.

(3)

negated by *Campbell v. Faikney*, 1752, M. 742. In the Inst. l. c., the author, after stating the doctrine recognised in *Campbell's* case, suggests certain qualifications of it, that mentioned in the text being one of them; but, says Professor Bell (Com. ii. 74, note 3), "these qualifications have not been countenanced by any decision."

(e) It is equally inept where used in the hands of the debtor's clerk or servant, or of any one who may legally, without an action, be violently and *viâ facti* deprived by the debtor of the possession of the goods (2 Bell's Com. 73).

(g) By 1 & 2 Vict. c. 114, a warrant to arrest may be inserted in the will of summonses raised before the Court of Session, concluding for payment of money (§ 16); and it is competent, whether under a warrant contained in the summons or in a separate writ, to arrest before executing the summons till caution be found, the arrestment, however, falling unless the summons be executed and called in Court within a limited period specified (§ 17). This applies also to Inferior Court summonses (16 & 17 Vict. c. 80, § 1; A.S. July 10, 1839, § 154; and also Small Debt and Debts Recovery Acts, 1 Vict. c. 41, § 8; 30 & 31 Vict. c. 96, § 3, *et seq.*). Arrestment on the dependence is competent at any period of the litigation, including the appeal to the House of Lords (*Haddington v. Richardson*, March 8, 1822, 1 S. 387), and covers principal, interest and expenses of process.

ance of a fact, or if his depending process be merely declaratory, without a conclusion of payment or delivery, such claims are not admitted to be sufficient grounds for arrestment (*Ross v. Renton*, Feb. 26, 1712, M. 690).<sup>(h)</sup>

4. Moveable debts are the proper subjects of arrestment; under which are comprehended conditional debts, and even depending claims. For lessening the expense of diligence to creditors all bonds which have not been made properly heritable by seisin are declared arrestable by 1644, c. 41, revived by 1661, c. 51. But this Act is limited to contracts and obligations, and does not extend to adjudications, wadsets, or other personal rights of lands which are not properly debts (*Lockhart v. L. Bargany*, Feb. 22, 1666, M. 701).<sup>(i)</sup> Certain moveable debts are not arrestable—(1) Debts due by bills, for those pass from hand to hand as bags of money.<sup>(k)</sup> (2) Future debts; for though inhibition extends to *adquirenda* as well as *adquisita* (ii. 11, § 4),<sup>(l)</sup> yet arrestment is limited, by its warrant, to the debt due at the time of serving it against the arrestee. Hence, an arrestment of rents or interests carries only those that have already either fallen due, or at least become current; as for such as had neither fallen due, nor become current at the date of the first arrestment, a new arrestment must be used, which may be done on the first warrant. Current rent is that which has begun to run

What debts are arrestable.

(6)

Neither bills nor future debts,

(7-9)

(h) *More v. Stirling & Sons*, July 5, 1822, 1 S. 547.

(i) To exclude arrestment the sasine must be registered (*Stewart v. Dundas's Creditors*, Feb. 20, 1706, M. 705). If a beneficiary's right in a trust-estate be moveable, it is arrestable in the hands of the trustees, though the estate consists of heritage unrealised (*Grierson v. Ramsay*, Feb. 25, 1780, M. 759; *Douglas v. Mason*, June 29, 1796, M. 16,213; *Learmont v. Shearer*, March 3, 1866, 4 Macph. 540). Arrestment is the proper diligence for attaching ships or shares of ships (*Mill v. Hoar*, Dec. 18, 1812, F.C.; *M'Aulay v. Gaulk*, March 6, 1821, F.C.; *Clark v. Loos*, June 17, 1853, 15 D. 750). The sum in a policy of insurance is arrestable during the life of the insured, and if he dies before the next premium falls due, the arrestment will be effectual (*Strachan v. M'Dougle*, June 19, 1835, 13 S. 954). Whether the arrestment would subsist after payment of another premium is a point still undecided.

(k) *Dick v. Goodall*, June 1, 1815, F.C.

(l) Altered by 31 & 32 Vict. c. 101, § 157.

nor alimentary  
debts are  
arrestable.

from the last term, but cannot be demanded till the next.(m) Claims depending on the issue of a suit are not considered as future debts; for the sentence, when pronounced, has a retrospect to the period at which the claim was first founded (*Wardrop v. Fairholm*, Dec. 19, 1744, M. 4860). The like doctrine holds in conditional debts.(n) (3) Alimentary debts are not arrestable; for these are granted on personal considerations, and so are not communicable to creditors (*Creditors of Douglas v. Douglas*, Dec. 19, 1738, M. 10,403); but the past interest due upon such debt may be arrested by the person who has furnished the alimony.(o) One cannot secure his own effects to himself for his maintenance, so as they shall not be affectable by his creditors. Salaries annexed to offices granted by the King, and particularly those granted to the Judges of the Session (*Spottis. Pr. v. "Pension," A.S.*, Feb. 27, 1662), and the fees of servants, are considered as alimentary funds; but the surplus fee, over and above what is necessary for the servants' personal uses, may be arrested (*Bogg v. Davidson*, July 9, 1668, M. 10,380).(p)

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(m) The whole of the term-day must elapse before the new term begins (*Wright v. Cunningham*, June 23, 1802, M. 15,919).

(n) See *Marshall v. Nimmo*, Dec. 18, 1847, 10 D. 328. That was the case of a contract for work to be performed, the contract price being declared payable when the work was completed; and the Court held that the price might be arrested for intermediate security during the progress of the work, though no execution would follow till it became payable by the completion of the contract.

(o) So, too, money or goods destined to a particular purpose, which arrestment would defeat, cannot be arrested (illustrated by *Mackenzie v. Tuach*, June 22, 1739, M. 713; *Stalker v. Aiton*, Feb. 9, 1759, M. 745). See above, tit. 5, § 1.

(p) The wages of labourers and manufacturers, so far as necessary for their subsistence, are not arrestable at common law and by 1 Vict. c. 41, § 7 (*Shanks v. Thomson*, July 10, 1838, 16 S. 1353); and all arrestments of wages on the dependence of small debt summonses are illegal (8 & 9 Vict. c. 39, § 1). The Act 33 & 34 Vict. c. 63, exempts from arrestment wages of labourers, farm-servants, artificers, and work-people, except any surplus above twenty shillings a-week. But this Act does not affect arrestments in virtue of decrees for alimentary allowances or payments, or rates and taxes. A minister's stipend is arrestable (*Smith v. Earl of Moray*, Dec. 13, 1815, F.C.).

5. In obligations which carry a yearly right to the creditor, if the obligation itself be arrestable, *e.g.*, a moveable bond, or an heritable one not clothed with seisin, the principal sum is carried by the arrestment, as well as the past interest; and, consequently, all the future interests until payment, as accessory to the right itself. But in rights of lands, or in heritable bonds perfected by seisin, no more can be arrested than the rents or interests that had either fallen due or become current at laying on the arrestment. In the same manner, the arrestment of a bond due to a wife, used by a creditor of the husband, carries only the past and current interest; for the right itself does not fall under the *jus mariti* (*Creditors of Clunies v. Sinclairs*, Jan. 19, 1739, M. 713).

The yearly profits may be arrested where the right itself cannot.

6. If, in contempt of the arrestment, the arrestee shall make payment of the sum or deliver the goods arrested to the common debtor, he is not only liable criminally for breach of arrestment, but he must pay the debt again to the arrester. (q) Nay, in the case of arrestment used at the market-cross of Edinburgh and pier and shore of Leith against a person abroad upon the public service, payment by the arrestee to his creditor, after the date of the arrestment, makes him liable in second payment to the arrester; because the arrester had done all in his power to notify his diligence (*Blackwood v. E. Sutherland*, July 22, 1701, M. 1793). (r) Arrestment is not merely prohibitory, as inhibitions are, but is a step of diligence which founds the user in a subsequent action, whereby the property of the subject arrested may be adjudged to him: it therefore does not, by our later practice,

Effect of breach of arrestment.

(14)

(11)

Arrestment does not fall by the arrestee's death.

(q) 1581, c. 18. No action lies on this statute *ultra valorem* of the subject arrested (*Grant v. Hill*, Feb. 27, 1792, M. 786).

(r) If the arrestee be furth of Scotland, the arrestment is now executed by delivery of a schedule at the office of the Keeper of Edictal Citations (1 & 2 Vict. c. 114, § 18; A.S. Dec. 24, 1838, § 7); and such arrestee will not be thereby interpellated from paying to his original creditor, unless it be proved that he, or those having authority to act for him, were in the knowledge of the arrestment having been used (19 & 20 Vict. c. 91, § 1). Even an arrestee resident in Scotland will not be liable in second payment if he pays the common debtor in circumstances in which it was impossible that he should know of the arrestment (*Laidlaw v. Smith*, Jan. 25, 1838, 16 S. 367, aff. Oct. 26, 1841, 2 Rob. App. 490).

fall by the death of the arrestee, but continues to subsist as a foundation for an action of forthcoming against his heir while the subject arrested remains *in medio* (*E. Aberdeen v. Scot's Crs.*, Dec. 22, 1738, M. 774). Far less is arrestment lost either by the death of the arrester or of the common debtor.(s)

Loosing of  
arrestment.

(12, 13)

7. Where arrestment proceeds on a depending action, it may be loosed by the common debtor's giving security to the arrester for his debt in the event it shall be found due.(t) By the ancient practice the receiving of this caution was committed entirely to the messenger, whose certificate that caution was given effectually loosed the arrestment: but all bonds of caution in loosings are now to be received by the clerk to the bills, and recorded in the books of Session (1617, c. 17). Arrestment founded on decrees, or on registered obligations, which in the judgment of law are decrees, cannot be loosed but upon payment or consignation; except (1) where the term of payment of the debt is not yet come, or the condition has not yet existed: (2) where the arrestment has proceeded on a registered contract, in which the debts or mutual obligations are not liquid (*Macfarlane v.*

Loosing not  
admitted but  
on payment or  
consignation in  
registered  
obligations.

(s) An executor-creditor confirmed will, however, be preferred, except in a question with the crown (see § 9, *infra*, note x), to one who has arrested during the common debtor's life, confirmation being a more perfect diligence than arrestment (*Wilson & M'Lellan v. Fleming*, June 28, 1823, 2 S. 430).

(t) See 1 & 2 Vict. c. 114, §§ 20, 21; A.S. June 8, 1850; *Supra*, b. iii. t. 3, § 29, note (i). "The right to arrest before the debt is due, or while it is contingent, is an equitable remedy; and where the use of that diligence appears to be nimious or oppressive, or the case of the arresting creditor is *primâ facie* bad, the Court recall it, sometimes on very limited caution, sometimes without caution at all (*Hamilton v. Fullerton*, March 4, 1823, 2 S. 364; *Maule v. Maule*, May 22, 1829, 7 S. 639). And very recently, in the case of *Mitchell of Stowe*, n.r., where arrestments of rents had been used to the extent of £20,000 on the dependence of an action of reduction, and where the defender, by the production of a great mass of family papers and recorded deeds, proved, *primâ facie* at least, that the case of the pursuer was either fraudulent or founded on gross mistake, the Court recalled the arrestments without caution, and found the user of the arrestment liable in expenses."—MOIR. See also the Small Debt and Debts Recovery Acts, 1 Vict. c. 41, § 8; 30 & 31 Vict. c. 96, § 5.

*Cowie*, July 31, 1705, M. 798): (3) where the decree is suspended or turned into a libel; for till the suspension be discussed, or the pending action concluded, it cannot be known whether any debt be truly due. A loosing takes off the *nexus* which had been laid on the subject arrested; so that the arrestee may thereafter pay safely to his creditor, and the cautioner is substituted in place of the arrestment for the arrester's security: yet the arrester may, while the subject continues with the arrestee, pursue him in a forthcoming, notwithstanding the loosing (*Graham v. Bruce*, Feb. 7, 1665, M. 792).

8. Arrestment is only an inchoated or begun diligence; to perfect it there must be an action brought by the arrester against the arrestee, to make the debt or subject arrested forthcoming. In this action the common debtor must be called for his interest, that he may have an opportunity of excepting to the lawfulness or extent of the debt on which the diligence proceeded. Though an arrestment cannot be executed without the territory of the judge who granted the precept, i. 2, § 1; (*u*) yet one inferior judge is competent to a forthcoming upon an arrestment laid on by the warrant of another (Stair, iii. 1, § 24; *Dalrymple v. Johnston*, June 23, 1710, M. 7662). Before a forthcoming can be pursued, the debt due by the common debtor to the arrester must be liquidated; for the arrester can be no further entitled to the subject arrested than to the extent of the debt due to him by the common debtor. If the pursuer cannot prove the debt due by the arrestee *scripto*, he must refer it to his oath. (*v*) Where the subject arrested is a sum of money, it is by the decree of forthcoming directed to be paid to the pursuer towards satisfying his debts; where goods are arrested the judge ordains them to be exposed to sale, and the price to be delivered to the pursuer (*Stevensons v. Paul*, Nov. 12, 1680, M. 5405): so that, in either case, decrees of

Exceptions.

Effect of  
loosing.Forthcoming  
on arrestment;

(15, 17)

before whom  
can it be  
pursued.The arrester's  
debt must be  
first liqui-  
dated.Decree of  
forthcoming  
is really an  
assignation.

(*u*) A Sheriff's precept may be executed beyond his territory on being indorsed by the sheriff-clerk of the sheriffdom where it is to be executed (1 & 2 Vict. c. 114, §§ 13, 19).

(*v*) This limitation of proof seems extremely doubtful (see Bell's Com. ii. 67).

forthcoming are judicial assignations to the arrester of the subject arrested.

Arrestments  
are preferred  
by their dates,

(18)

provided the  
arrester insists  
in his forth-  
coming.

9. In all competitions regard is had to the dates, not of the grounds of debt, but of the diligences proceeding upon them. In the competition of arrestments the preference is governed by their dates, according to the priority, even of hours, where it appears with any certainty which is the first. (x) But as arrestment is but a begun diligence, therefore, if a prior arrester shall neglect to insist in an action of forthcoming for such a time as may be reasonably construed into a desertion of his begun diligence, he loses that preference which it was in his power to have obtained for himself, and the last arrester is preferred. But as dereliction of diligence is not easily presumed, the distance of above two years between the first arrestment and the decree of forthcoming was found not to make such a *mora* as to entitle the posterior arrester to a preference (*Nairn v. Brown*, Jan. 1724, M. 820.) (y) This rule of preference, according to the dates of the several arrestments, holds by our present practice, whether they have proceeded on a decree or on a dependence; on debts not yet payable or on debts already payable; provided the pendency shall have been clothed, or the debt have become payable, before the issue of the competition (*Brodie v. McLellan*, June 14, 1710, M. 816; *Watkins v. Wilkie*, Jan. 2, 1728, M. 820.) (z)

Rules of pre-  
ference  
between ar-  
resters and  
assignees.

(19)

10. In the competition of arrestments with assignations,

(x) *Cameron v. Boswell*, Feb. 28, 1772, M. 821; *Wright v. Anderson*, Jan. 28, 1774, M. 823; *Herts v. Itzig*, Mar. 14, 1865, 37 Jur., 365. Note, however, that by 19 & 20 Vict. c. 56, § 30, arrestment for a Crown debt operates to transfer to the Crown all right and interest in the fund arrested *preferably* to all the other creditors of the Crown debtor, and the arrestee is entitled to pay without waiting for a decree of forthcoming.

(y) As to the prescription of arrestments, see below, iii. 7. 8.

(z) The Bankruptcy Act (19 & 20 Vict. c. 79) enacts (§ 12) that arrestments and poindings used within sixty days prior to notour bankruptcy, or four months thereafter, shall rank *pari passu*; and (§ 108) that no arrestment or poinding executed on or after the sixtieth day prior to the sequestration shall be effectual. (See *Dobbie & Co. v. Nisbet*, May 30, 1854, 16 D. 881).

an assignation by the common debtor, intimated before arrestment, is preferable to the arrestment; for by the intimated assignation the debtor is fully divested, after which the subject cannot be arrested as his. If the assignation is granted before arrestment, but not intimated till after it, the arrester is preferred; for arrestment renders the subject litigious, and so excludes every voluntary right of the debtor, either granted after the diligence or not completed till after it. From these rules a third necessarily follows, that if the intimation and arrestment are of equal dates they are preferable *pari passu*, unless the arrester has deserted his diligence by neglecting for a reasonable time to obtain a forthcoming.

11. *Poining* is that diligence affecting moveable subjects Poining; by which their property is carried directly to the creditor. (20)  
 Real poining, (a) which proceeds on real debts, or *debita fundi*, is treated of below (iv. 1, § 3). Personal poining its warrant. may have for its warrant either letters of horning, containing a clause for poining, and then it is executed by messengers; or precepts of poining, granted by Sheriffs, Commissaries, &c., which are executed by their proper officers. (b)  
 No poining can proceed till a charge be given to the debtor A previous charge must be given, (21) to pay or perform, and the days thereof be expired, by 1669, c. 4, except poinings against vassals for their feuduties, and poinings against tenants for rent, proceeding except for poinings for feu-duties or rents. upon the landlord's own decree; in which the ancient custom of poining without a previous charge continues (*Macqueen v. Stirling*, Dec. 18, 1735, M. 6862). (c) A debtor's goods Arrestment is no bar to poining. may be poined by one creditor, though they have been arrested before by another; for arrestment, being but an imperfect diligence, leaves the right of the subject still in the debtor, and so cannot hinder any creditor from using a more perfect diligence, which has the effect of carrying the property directly to himself. (d)

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(a) Or poining of the ground.

(b) See *ante*, iii. 6. 2, note (c).

(c) The first of these exceptions is unnecessary (Inst. l. c.), the Act being confined to personal poining, while the second possesses only antiquarian interest.

(d) See *infra*, § 15.

What subjects  
may be  
poinded.

(22)

No plough-  
goods can be  
poinded in the  
time of labour.

12. It is only goods belonging to the debtor that can be poinded.<sup>(e)</sup> Anciently the tenant's goods might be poinded for his landlord's debt, either real or personal, to the full extent of the debt, even though the tenant had not been in arrear of rent; but now, of a long time, probably from a favourable interpretation of Act 1469, c. 37, no poinding has proceeded against a tenant, even to the least extent, for his landlord's personal debt. No cattle pertaining to the plough, nor instruments of tillage, could, by the Roman law (l. 7, 8, *C. quæ res pign. obl.*, 8, 17), be impignorated for debt, or carried off by the diligence of creditors; nor can they be poinded by ours in the time of labouring or tilling the ground, unless where the debtor has no other goods that may be poinded (1503, c. 98). By labouring time is understood that time in which that tenant whose goods are to be poinded is ploughing, though he should have been earlier or later than his neighbours (*Arnot v. Greig*, June 20, 1712, M. 10,527-8); but summer-fallowing does not fall under the Act (*Watson v. Reid*, Nov. 21, 1628, M. 10,510). Though the statute prohibits such poinding, not only where the debtor has moveables, but even where he has lands that may be appraised, this last part of the alternative has gone into disuse (*Turner v. Scott*, Dec. 7, 1692, M. 10,523).

The form of  
poinding.

(23, 24)

13. In the execution of poinding, the debtor's goods must be appraised, first, on the ground of the lands where they are laid hold on, and a second time at the market-cross of

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(e) The subjects of poinding are corporeal moveables, except ships, whether in the debtor's possession or in the hands of another. In one case a person may poind goods in his own hands (see *ante*, § 1, note b). Debts cannot be poinded. The competency of poinding bank-notes was discussed in *Alexander v. M'Lay*, Feb. 10, 1826, 4 S. 439. Growing corn may be poinded (*Ballantine v. Watson*, June 15, 1709, M. 10,526), but not when only braired (*Elder v. Allan*, July 5, 1833, 11 S. 902). Goods in which the debtor has only a joint interest (*Fleming v. Twaddle*, Dec. 2, 1828, 7 S. 92), or a temporary interest, such as a liferent (*Scott v. Price*, May 13, 1837, 15 S. 916), cannot be poinded. In poindings at the Crown's instance the Sheriff may attach the "debtor's whole moveable effects without exception, including bank-notes, money, bonds, bills, crop, stocking, and implements of husbandry of all kinds" (19 & 20 Vict. c. 56, § 32).

the jurisdiction, by the stated appraisers thereof; or if there are none, by persons named by the messenger or other officer employed in the diligence. Next, the messenger must, after public intimation by three oyeses, declare the value of the goods according to the second appraisement, and require the debtor to make payment of the debt, including interest and expenses. If payment shall be offered to the creditor, or in his absence to his lawful attorney, or if, in case of refusal by them, consignment of the debt shall be made in the hands of the judge-ordinary, or his clerk, the goods must be left with the debtor; if not, the messenger ought to adjudge and deliver them over, at the appraised value, to the user of the diligence, towards his payment. And the debtor is entitled to a copy of the warrant and executions, as a voucher that the debt is discharged in whole or in part by the goods poinded.(g)

14. Ministers may, by 1663, c. 21, poind for their stipends upon one appraisement on the ground of the lands; and landlords were always in use to poind so far for their rents (*Balfour*, p. 40, c. 10; *Macqueen v. Stirling*, Dec. 18, 1735, M. 6862). By the late Jurisdiction Act (20 Geo. II.) the appraisement of the goods at the market-cross of the next royal borough, or even of the next head borough of stewartry or regality, though these jurisdictions be abolished, is declared as sufficient as if they were carried to the head borough of the shire.(h) Poinding, whether it be considered as a sentence, or as the execution of a sentence, must be proceeded in between sun-rising and sun-setting; or at least it must be finished before the going off of daylight (*Douglas v. Jackson*, Feb. 11, 1675, M. 3739; see *Gordon v. Hope*,

Ministers and heritors may poind on one appreciation.

(23)

Appreciation at the market-cross of an abolished jurisdiction.

(g) The procedure in poindings is now regulated by 1 & 2 Vict. c. 114, §§ 23-32. The principal changes since the author's time are—that one appraisement is sufficient; that other creditors may insist on being conjoined; that the goods must (except in poindings at the instance of the Crown, 19 & 20 Vict. c. 56, § 32) be left by the messenger with the person in whose possession they were when poinded; and that the sale of the poinded goods takes place under authority of the Sheriff, to whom the messenger reports the poinding within eight days after the day on which it was executed.

(h) See preceding note.

The powers of  
the messenger  
in pouncing.

(26)

Nov. 10, 1703, M. 3739). The powers of the officer employed in the execution of poindings are not clearly defined by custom, in the case of a third party claiming the property of the goods to be poinded. This is certain, that he may take the oath of the claimant upon the verity of his claim; and if from thence it shall appear that the claimant's title is collusive, he ought to proceed in the diligence; but if there remains the least doubt, his safest course is to deliver the goods to the claimant, and to express in his execution the reasons why pouncing did not proceed.<sup>(i)</sup>

(27)

Pouncing not  
completed.

15. As law has required certain solemnities in pouncing, without which the property of the goods cannot be transferred to the creditor, therefore, if a messenger should be interrupted before completing the pouncing by any fatality or force not imputable to a co-creditor, such incomplete pouncing cannot hurt the diligence of that co-creditor. But where a pouncing was forcibly stopped by the possessor of the goods, on pretence that they had been already arrested in his hands by another, it was considered as completed in a question with the prior arrester (*Corry v. Muirhead*, Feb. 13, 1736, M. 2760)—probably from a presumption that the arrester whose diligence was used as a handle for stopping the messenger had been privy to the deforcement.<sup>(k)</sup> The person himself who stops a pouncing *viâ facti*, on groundless pretences, is liable, both criminally in the pains of deforcement (iv. 4. 34), and civilly, in the value of the goods which might have been poinded by the creditor.<sup>(l)</sup>

Deforcement  
of the  
messenger.

(i) In modern practice it is believed that the pouncing is invariably carried out,—any third party claiming the goods having ample opportunity of vindicating his right by interdict before the sale is completed.

(k) See *ante*, § 11.

(l) By 1 & 2 Vict. c. 114, § 30, a person unlawfully intruding with or carrying off poinded effects is declared liable to imprisonment until he restore the effects, or pay double the appraised value (see *Brown v. Stephenson & Co.*, May 29, 1849, 11 D. 1083). As to the ranking of poindings under the Bankruptcy Act, see *ante*, § 9, note (z).

## TIT. VII.—OF PRESCRIPTIONS.

1. Prescription, which is a method both of establishing and of extinguishing property, is either positive or negative. *Positive* prescription is generally defined (as the Roman *usucapio*) the acquisition of property (it should rather be, when applied to our law, the securing it against all further challenge) by the possessor's continuing his possession for the time which law has declared sufficient for that purpose. *Negative*, is the loss or amission of a right, by neglecting to follow it forth or use it during the whole time limited by law. The doctrine of prescription, which is by some writers condemned as contrary to justice, has been introduced that the claims of negligent creditors might not subsist for ever, that property might be at last fixed, and forgeries discouraged, which the difficulty of detecting must have made exceeding frequent if no length of time had limited the legal effect of writings. Prescription.  
(1, 2)

2. *Positive* prescription was first introduced into our law by 1617, c. 12, which enacts that whoever shall have possessed his lands, annualrents, or other heritages peaceably in virtue of infeftments for forty years continually after their dates, shall not thereafter be disquieted in his right by any person pretending a better title. Under heritages are comprehended fairs or markets, and every other right that is *fundo annexum*, and capable of continual possession. Continued possession, if proved as far back as the memory of man, presumes possession upwards to the date of the infeftment.(a) Positive prescription ;  
(2, 3, 5) The whole course of possession must, by the

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(a) In the case of patronages it has been held that one act of presentation does not satisfy the requirements of the statute in respect of possession, but that "there be two or more acts, with a distinct interval between them. This infers continuance of the possession *animo* during the interval, on the principle *probat is extremis præsumuntur media*."—*Per* L. Corehouse in *Macdonell v. D. Gordon* (Feb. 26, 1828, 6 S. 600). "With regard to coal, the mere proprietorship of the surface implies no prescriptive possession of the coal (where the coal is claimed, not in virtue of an express grant of coal, but simply of a grant of the lands without reservation of coal); the possession, whatever may be its extent

Act, be founded on seisin; and, consequently, no part thereof on the bare right of apparençy (*E. Argyll v. L. M'Naughton*, Feb. 15, 1671, M. 10,791);(b) but forty years' possession without seisin is sufficient in the prescription of such heritable rights as do not require seisin. The possession must also be without any lawful interruption, *i.e.*, it must neither be interrupted *vid facti* nor *vid juris*. The prescription of subjects not expressed in the infeftment as part and pertinent of another subject, especially expressed, has been already explained (ii. 6, § 6).

its title.

(4)

Singular successors must produce both charter and seisin.

An heir need produce only seisin.

3. The Act requires that the possessor produce as his title of prescription a charter of the lands preceding the forty years' possession, with the seisin following on it; and where there is no charter extant, seisin one or more, standing together for forty years, and proceeding either on retours or precepts of *clare constat*. This has given rise to a reasonable distinction, observed in practice between the prescription of a singular successor and of an heir. Singular successors must produce for their title of prescription not only a seisin, but its warrant as a charter, disposition, &c., either in their own person or in that of their author.(c) But the production by an heir of seisin, one or more, standing together for forty years, and proceeding on retours or precepts of *clare constat*, is sufficient. The heir is not obliged to produce the retours or precepts on which his seisin proceed (*Purdy v. L. Torphichen*, Nov. 9, 1739, M. 10,796); nor

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or the frequency of the exercise of the right, must be a possession and working of the actual coal itself. Slight and intermitted acts of possession by working will not be enough, but there must be reasonably continuous working, making allowance for those impediments which occur in such operations (*Forbes v. Livingstone*, Nov. 29, 1827, 1 S. 263, H.L., 1 W. & S. 657; on remit, 6 S. 167).—MOIR.

(b) It is now fixed, on the contrary, that the possession of an heir on apparençy may be joined to that of his ancestor, because it can only be ascribed to the same title (*Caitcheon v. Ramsay*, 1791, M. 10,810).

(c) Not only may the possession of heirs on apparençy be reckoned in the period of prescription (see preceding note), but "a singular successor though uninfeft, is entitled to plead the positive prescription if he can connect it with an infeftment" (*Crawford v. Durham*, June 2, 1826, F.C., 4 S. 665, 3 Ross's L.C., 438).

is the singular successor obliged to produce the ground of his charter (*Ged v. Baker*, 1741, M. 10,789); so that, if the title of prescription produced be a fair deed, and a sufficient title of property, the possessor is secured by the Act, which admits no ground of challenge but falsehood.(d) A special statute for establishing the positive prescription in moveable rights was not necessary; for since a title in writing is not requisite for the acquiring of these, the negative prescription, by which all right of action for recovering the property is cut off, effectually secures the possessor. (7)

4. The negative prescription of obligations by the lapse of forty years was introduced into our law, long before the positive, by 1469, c. 29; 1474, c. 55. The prescription is now amplified by the foresaid Act 1617, which has extended it to all actions competent upon heritable bonds, reversions, and others whatsoever, unless where the reversions are either incorporated in the body of the wadset right, or registered in the register of reversions. And reversions so incorporated or registered are not only exempted from the negative prescription but they are an effectual bar against any person from pleading the positive (*Elliot v. Maxwell*, 1727, M. 10,977).(e) Negative prescription. (8, 10)

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(d) See below, § 12. As to prescription on double titles, see Note A at the end of this Title.

(e) This decision is not law (2 Bell's Illus. 373; Bell's Pr. 2008). The words of the Act 1617 make this prescription refer to actions alone, not to rights. Hence, it is properly a prescription of obligations, and "the right of complete ownership in a feudal subject cannot suffer the negative prescription" (*Macdonell v. D. Gordon*, Feb. 26, 1828, 6 S. 601—*per* Lord Corehouse). Such rights are lost only when they are established by the positive prescription in the person of another (Inst. l. c., *infra*, § 17). Professor Moir refers to the definition of Bankton (ii. 12, 5) as the best:—"It may extinguish rights which are certainly of an heritable character, though falling short of actual rights of property. So a right of servitude, being viewed merely as a burden on lands, may be lost by non-exercise by the holder of the dominant tenement; and this even in the case of a servitude incorporated in the titles of the servient tenement (*Graham v. Douglas*, Feb. 7, 1735, M. 10,745). So also rights of jurisdiction and constabulary, the privileges of royal burghs, the right of levying customs or dues, though conferred by charter or royal grant, may all be lost by the operation of the negative prescription (*Miller v. Storis*, June 15, 1757, M. 10,738; *Mags. of Linlithgow v. Mitchell*, June 20, 1822, 1 S.

Shorter  
negative  
prescription.

(16)

Prescription of  
spuilzie and  
ejection.

5. A shorter negative prescription is introduced by statute in certain rights and debts. Actions of spuilzie, ejection, "and others of that nature," must be pursued within three years after the commission of the fact on which the action is founded, by 1579, c. 81. As in spuilzies and ejections, the pursuer was entitled, *in odium* of violence, to a proof by his own oath *in litem*, and to the violent profits against the defender, that statute meant only to limit these special privi-

515). In general, where there is a grant of levying dues within a certain range either of river or territory, the exercise of the right at any one point preserves the grant over the whole, and the right does not fall by the negative prescription (*Mags. of Edinburgh v. Scott*, June 10, 1836, 14 S. 922; *Mags. of Campbelton v. Galbraith*, Dec. 14, 1844, 7 D. 220). But if there be not only a *non-usage to levy*, but, as in the *Linlithgow* case, a contrary open and uninterrupted practice on the part of the public, or the proprietor of the lands, to use the shore at that place for shipping or landing goods without payment, this will infer dereliction at the particular point where this contrary use has prevailed (see *Dundee Harbour Trs. v. Dougal*, Nov. 14, 1848, 11 D. 6, 1464, aff. 1 S. 660). The contrary possession in these cases is not of the nature of positive prescription, for it does not proceed on written title at all. It is simply positive acts inconsistent with any other view than that of the loss of right by the negative prescription on the part of the holder of the grant."—*Morr.* But although the negative prescription cannot be pleaded directly against a right of heritable property, it does not follow that the person against whom it cannot be pleaded must succeed in his claim. Its use is "in trying the validity of competing progresses, and in getting rid of various objections which might otherwise have been competent. For example, A disposes to B, B to C, and so on. One of these dispositions is objected to on the ground of forgery, or because it was impetrated by force or fraud. All these objections are cut off by the negative prescription. For although exceptions founded on *ex facie* nullities,—*e.g.*, that the deed is not subscribed, or is tested by only one witness,—are not barred, yet all objections not appearing *ex facie* on the deed are effectually cut off by the negative prescription" (*Cubbison v. Hyslop*, Nov. 29, 1837, 16 S. 112, *per* Lord Corehouse; *Ersk. Inst.* iii. 7, 9; *Paul v. Reid*, Feb. 8, 1814; *E. Dundonald v. Boyes' Trs.*, May 12, 1836, 14 S. 737; *Paton v. Drysdale*, 1725, M. 10,709; *Shepherd v. Grant's Trs.*, Jan. 24, 1844, 6 D. 464, aff. July 21, 1844, 6 Bell's App. 153). Practically, almost every right or claim which has been allowed to lie over without being insisted in for forty years from the time when it became exigible, is held to be extinguished and discharged by this prescription (*Burns v. Burns*, March 5, 1857, 19 D. 626; *Allan v. Brander*, March 8, 1839, 1 D. 678, aff. March 7, 1842, 1 Bell's App. 167; Bell's Pr. 608).

leges by a three years' prescription, without cutting off the right of action, where the claim is restricted to simple restitution (*Hay v. Kerr*, March 16, 1627, M. 12,131).<sup>(g)</sup> Under the general words "and others of that nature," are comprehended all actions where the pursuer is admitted to prove his libel by his own oath *in litem*.

6. Servants' fees, house-rents, men's ordinaries (*i.e.*, <sup>Prescription of servants' fees, house-rents, and merchants' accounts.</sup> money due for board), and merchants' accounts, fall under the triennial prescription, by 1579, c. 83. There is also a general clause subjoined to this statute, of "other the like debts," which includes alimentary debts (*Hamilton v. Lady Ormiston*, July 25, 1716 M. 11,100),<sup>(h)</sup> wages due to work-

(17, 18)

(g) And ordinary damages (Inst., l. c).

(h) "This does not apply to the aliment of natural children, as such claims arise *ex debito naturali*, and not *ex contractu* (*Thomson v. Westwood*, Feb. 26, 1842, 4 D. 833). The Act applies also to the accounts of surgeons and apothecaries (Inst. l. c.); of a clerk in a submission (*Farguharson v. L. Advocate*, 1755, M. 11,108); of an advocate's clerk for fees (*Fortune's Exrs. v. Smith*, March 31, 1864, 2 Macph. 1005); of a surveyor (*Stevenson v. Kyle*, Feb. 13, 1850, 12 D. 673); of an engraver employed to prepare Parliamentary plans of a proposed railway (*Johnston v. Scott*, Jan. 18, 1860, 22 D. 393); but not to the account of charges of an engineer or of a railway contractor for going to London to give evidence in favour of a bill (*Blackadder v. Milne*, March 4, 1851, 13 D. 820). It has also been held to apply to the case of a single purchase of goods. 'The distinction,' says the Lord Ordinary (Kinloch), whose judgment was acquiesced in, 'lies in the character of the transaction, not in the number of the furnishings; though in settling the category to which the claim belongs it may be very material that only one furnishing took place' (*Gobbi v. Lazzaroni*, March 19, 1861, 21 D. 801). Attempts have been made to extend the term 'merchants' compts,' to an accounting between agent and principal, as in the case of *M'Kinlay v. M'Kinlay* (Dec. 11, 1851, 14 D. 162); but these have been discountenanced. Lord Fullerton said 'the Court had gone far enough already as to the operation of the statute. Every one knows that, according to the phraseology of the statute, merchants' accounts are something very different from mercantile accounts. A merchant, in Scottish phrase, is a dealer or shopkeeper; a person who sells articles generally from day to day on credit, but on short credit. It is to such debts, or debts of an analogous kind, that the statute applies. But to hold it applicable to mercantile accounts would be to subject to the operation of the statute every account-current among merchants; nay, every banker's account, though nothing but payments and advances of money entered into it.'—MOIR. (See Dickson on Evidence, § 485, *et seq.*)

The period from which these prescriptions commence.

men (*Bayne v. —*, Dec. 21, 1692, M. 11,092), and accounts due to writers, agents, or procurators (*Sommervell v. Muirhead's Exors.*, Dec. 16, 1675, M. 11,087). These debts may, by this Act, be proved after the three years, either by the writing<sup>(i)</sup> or oath<sup>(k)</sup> of the debtor; so that they prescribe only as to the mean of proof by witnesses; but after the three years it behoves the creditor to refer to the debtor's oath not only the constitution but the subsistence of the debt (*White v. Spence*, 1683, M. 11,065); for the debtor's oath that a debt once existed, unless it contains also an acknowledgment that it is still due, cannot be said to prove the debt in terms of the statute.<sup>(l)</sup> In the prescription of house rents, servants' fees, and alimony, each term's rent, fee, or alimony,

(i) The writing need not be formally authenticated, but must show the subsistence of the debt after the termination of the three years (Inst. l. c.; Bell's Com. i. 333). "The writing need not contain an express admission of the debt if it be the fair inference from the writing; of which there is a remarkable instance in the case of *Macandrew v. Hunter* (June 13, 1851, 13 D. 1151). Admissions made by the debtor in judicial proceedings of constitution of the debt have been held equivalent to writ or oath, if clearly indicating that the debt existed, and was unpaid (*Ritchie v. Little*, Jan. 14, 1836, 14 S. 216)."—MOIR.

(k) "The chief questions which occur in cases of reference to oath under this prescription, as under the sexennial, are with reference to extrinsic or intrinsic qualities,—i.e., whether certain qualities annexed to the admissions contained in the oath can be regarded as intrinsic, and so amounting to a statement of payment or satisfaction, or whether they are extrinsic, and do not go to the extinction of the debt, but only form the foundation for a counter-claim. When examined on reference to oath the defender cannot shelter himself under a general denial of resting-owing. He must answer all pertinent interrogatories specially; and if these resolve into an admission of the constitution of the debt, but coupled with a statement that it has been settled, not by payment but by compensation, or in some other form, this is regarded as an extrinsic quality, which is not sufficient to elide the prescription. An averment that the money was received not in loan but as a donation, or to extinguish a debt previously due to the deponent, or that the goods were not furnished on the defender's credit, substantially implies that the debt was never constituted."—MOIR.

(l) The statute rests "upon plain reasons of policy and expediency in requiring that, unless the creditor means to rest his whole case upon the writ or oath of the debtor, he must bring his action within the three years."—*Per* L. Rutherford in *Cullen v. Smeal*, *infra*. The statute

runs a separate course of prescription ; so that, in an action for these, the claim will be restricted to the arrears incurred within the three years immediately before the citation (*Ross v. M. of Salton*, Feb. 12, 1680, M. 11,089 ; *Fergusson v. Muir*, Jan. 14, 1737, M. 11,103). But in accounts prescription does not begin till the last article ; for a single article cannot be called an account (*Sommervell v. Muirhead's Exors.*, Dec. 16, 1675, M. 11,087).(m) The currency of an account, the first part of which was furnished to a person deceased, is preserved in a question with the heir by new furnishings within the three years to that heir ; because *hæres est eadem persona cum defuncto* (*Graham v. L. Stonebyres*, Feb. 26, 1670, M. 11,086).(n) Actions of removing must

Prescription of  
removings.

creates no presumption either of dereliction or payment, although in some cases it may *proceed on* a presumption of payment ; in others, on the footing that some of the debts to which it applies were not the proper subjects of accounting at all, but were settled at the time. There has, indeed, been a current of opinion down to a very recent time in favour of the theory that the application of the statute depends on a presumed payment of the debt. It was decided, however, in *Alcock v. Easson*, Dec. 20, 1842, 5 D. 357, that when a defender pleads this statute it is not necessary to aver payment of the debt, a general denial of resting-owing being involved in the statutory defence. As a logical consequence of this decision, the construction put upon the statute by Professor Bell (Pr. 632), and in *Auld v. Aikman* (July 7, 1842, 4 D. 1487), and apparently supported by a series of earlier cases, was afterwards held to be erroneous ; and it was decided that, even when action is brought against the debtor's heir, both the constitution and the subsistence of the debt must be established by the writ or oath of the defender, and that whether the ancestor died before or after the end of the three years. "The statute excludes all considerations but the simple element of dates ;" and its construction is "not affected by applying to it certain presumptions of payment or of non-payment, which it is said various states of the facts may raise" (*Per L. J.-C. Hope in Cullen v. Smeal, infra*) ;—e.g., if the debt was not paid at the death of the contractor, no presumption of non-payment thereafter arises, but the pursuer must still prove resting-owing ; nor does the executor's oath that he knows nothing of the matter entitle him to decree for payment (*Cullen v. Smeal*, July 12, 1853, 15 D. 868).

(m) See *supra*, § 6, note (h).

(n) On the contrary, it is fixed that death closes accounts, and that furnishings made to a representative commence a new account (*Kennedy v. M'Douall*, 1741, M. 11,089, 5 B.S. 710 ; Bell's Com. i. 332). "The

(19)

also be pursued within three years after the warning, by 1789, c. 82.(o)

Prescription of  
retours, and  
processes of  
error.

7. Reductions of erroneous retours, and actions of error against the inquest, did prescribe if not pursued within three years after the service, by 1494, c. 57; which term is lengthened to twenty years as to the reduction of retours, by 1617, c. 13. This last has the appearance of a declaratory statute, as if the former had only meant to save the inquests from processes of error, and not to cut off the right of reduction by the triennial prescription; but it does both in express words. And therefore the last Act contains a special clause, that those who had, before the date of it, acquired right to lands from persons retoured thereto, shall enjoy their rights as the law then stood. It statutes, in general, that all erroneous retours shall be free from challenge after twenty years; and so is not to be confined, as Sir Geo. Mackenzie conjectures in his observations upon it, to the competition of different kinds of heirs between themselves, *e.g.*, between an heir of line, and an heir of tailzie.(p)

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doctrine of the continuity of the account as a *unum quid* has been carried to this length, that where a law-agent had six different accounts against his employer for different pieces of business, the whole was regarded as one account, against which prescription could only commence from the article of the latest date (*Elder v. Hamilton*, May 15, 1833, 11 S. 591).

(o) *I.e.*, within three years after the term at which the tenant is required to remove (Inst. l. c.).

(p) The opinion of Sir George Mackenzie here referred to is retracted in a Supplemental Note to the Obs. (see Works, i. 379, 443). This prescription operates in favour of persons claiming as heirs of provision as well as heirs of line (*Neilson v. Cochrane's Reprs.*, Jan. 17, 1837, 15 S. 365, aff. March 19, 1840, 1 Rob. 82; *Campbell v. Campbell*, Jan. 25, 1848, 10 D. 461). It is a complete protection to one served heir against "another person claiming only to be heir. But the heir may be disturbed by any person who comes in with a stronger title than that of mere heirship."—*Per* L. Cottenham, C., in *Neilson v. Cochrane*, *supra*. But this, like other prescriptions, "does not cover defects that appear upon the face of the writing upon which prescription is pleaded," *i.e.*, the retour,—*e.g.*, if the retour itself show that the person assumed to be served heir was not really heir of the person last in the right (*Fullarton v. Hamilton*, Feb. 12, 1824, 2 S. 698, aff. June 20, 1825, 1 W. & S. 410).

Service is no longer necessary to the vesting of a right by succession,

8. Ministers' stipends and multures prescribe in five years after they are due; and arrears of rent (or maills and duties) five years after the tenant's removing from the lands, by 1669, c. 9. Stipends due during a vacancy, though they are not included in the strict letter of this Act, have been found to fall under the spirit of it (*Gloag v. M'Intosh*, 1753, M. 11,063, Elch. "Stipend," 8); because the favour of the debtor is equally strong in both. As the prescription of maills and duties was introduced in favour of poor tenants, that they might not suffer by neglecting to preserve their discharges, a proprietor of lands subject to a liferent, who has obtained a lease of all the life-rented lands from the liferenter, is not entitled to plead it (*Murray v. Trotter*, Dec. 9, 1709, M. 11,054); nor a tacksman of one's whole estate, who had, by the lease, a power of removing tenants (*L. Carfin*, July 20, 1733, n.r.).(q) By the same statute, bargains concerning moveables, or sums of money which are proveable by witnesses, prescribe in five years after the bargain. Under these are included sale, locations, and all other consensual contracts, to the constitution of which writing is not necessary.(r) But all the above-mentioned debts contained in the statute may, after the five years, be proved, either by the oath or the writing of the debtor; of which above, § 6.(s) By

Prescription of ministers' stipends, multures, and arrears of rent;

of bargains of moveables;

but the right of any one succeeding to heritage as heir may be challenged within twenty years from the date of infeftment by any one who could have challenged the heir's service. This prescriptive period runs from the date of entering into actual possession, if that be more recent than the infeftment (37 & 38 Vict. c. 84, § 13).

(q) See *Nisbet v. Baikie*, 1729, M. 11,059. This is incorrect, the decision referred to appearing to relate to a tack of "the maills and duties" of the estate. The statute applies to a proper tack of the estate (*Fairholm v. Livingston*, 1825, M. 11,058). This prescription is barred by a sequestration for rent past due (*Hogg v. Low*, June 13, 1826, 4 S. 702); or by pleading compensation in respect of the rents against a claim by the tenant within the five years (*M'Donald v. Jackson*, Nov. 21, 1826, 5 S. 28); but not by a sequestration *currente termino* (*Cochrane v. Ferguson*, Jan. 15, 1830, 8 S. 324). It may be pleaded by the tenant's cautioner (*Duff v. Innes*, 1771, M. 11,059).

(r) *E. Southesk v. Reddy*, 1682, M. 11,066, 12,326; *Hunter v. Thomson*, June 29, 1843, 5 D. 1285.

(s) As in the triennial prescription, both the constitution and subaist-

and of arrestments.

this Act, also, a quinquennial prescription is established in arrestments, whether on decrees or depending actions. The first prescribe in five years after using the arrestment; and the last in five years after sentence is pronounced on the depending action.(t)

Limitation of cautionary engagements.

(22-24)

9. No person binding for or with another, either as cautioner or co-principal, in a bond or contract for a sum of money, continues bound after seven years from the date of the bond, provided he has either a clause of relief in the bond or a separate bond of relief, intimated to the creditor at his receiving the bond (1695, c. 5).(u) But the Act

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ence of the debt must after the five years be proved by the writ or oath of the alleged debtor (*Campbell v. Grierson*, Jan. 15, 1848, 10 D. 361).

(t) Arrestments now prescribe in three years. Arrestments used on a future or contingent debt prescribe in three years from the time when the debt becomes due, or the contingency is purified (1 & 2 Vict. c. 114, § 22). Arrestments on the dependence for debts of or under £8, 6s. 8d, subsist only for three months (1 Vict. c. 41, § 6). Inhibition prescribes in five years, but may be renewed (see *supra*, II. xi. 8).

(u) Where a party is bound expressly as cautioner, he can plead the statute though there be neither clause nor intimated bond of relief (*Ross v. Craigie*, 1729, M. 11,014; *Yuille v. Scott*, Nov. 28, 1827, 6 S. 137, aff. Sep. 15, 1831, 5 W. & S. 436, 8 S. 485). "When the clause of relief does not appear on the face of the bond, but is contained in a separate writing, it has been ruled, somewhat harshly as it must appear to us, that the creditor's private knowledge of the existence of such a bond of relief is not sufficient to entitle the cautioner to plead the benefit of the statute (*Bell v. Herdman*, Feb. 14, 1727, M. 11,039); though where the creditor himself was the writer of the bond of relief and a witness to its execution, this was held sufficient without formal intimation (*M'Rankin v. Schaw*, Feb. 24, 1714, M. 11,034). It is not easy to reconcile these decisions. If intimation be a statutory requisite, the last of these decisions was wrong; if it be not, and equipollents are in any case admissible, private knowledge by the creditor should be sufficient to bar him *personali exceptione* from pleading the want of an intimated bond of relief."—MOIR. The correctness of the judgment in *M'Rankin v. Schaw* was doubted in *Drysdale v. Johnstone* (Jan. 25, 1838), 1 D. 409, and effect was refused to private knowledge coupled with the fact that letters of relief by the principal to the two co-obligants were drawn up by the same agent who acted for the creditor in the transaction. The true principle seems to be, as there stated by Lord Gillies, that the creditor's private knowledge that some of the co-obligants are cautioners, and have certain rights of relief in a question with the principal obli-

declares that all diligence used within the seven years against the cautioner shall stand good.(x) As this is a public law, intended to prevent the bad consequences of rash engagements, its benefit cannot before the lapse of seven years be renounced by the cautioner (*Norrie v. Porterfield*, Feb. 19, 1724, M. 11,013).(y) As it is correctory, it is strictly interpreted.(z) Thus, bonds bearing a mutual clause of relief *pro ratâ* fall not under it (*Ballantyne v. Muir*, Jan. 21, 1708, M. 11,010); nor bonds of corroboration (*Scott v. Rutherford*, 1715, M. 11,012; *Lady Henr. Gordon v. Tyrie*, 1748, M. 11,025); nor obligations where the condition

It is strictly interpreted.

gant, cannot in the least impair his own right, seeing that he has (as in the case of a cash-credit bond) taken all the obligants expressly bound as principals to him. Further, "to give a cautioner the right to plead the statutory limitation, not only must his cautionary character appear, but he must be bound in one and the same obligation with the principal debtor. Accordingly, if the cautionary obligation is undertaken by a separate writing, even though of the same date with the obligation of the principal debtor, the case does not fall within the statute (*Howison v. Howison*, Dec. 8, 1784, M. 11,030; *Tait v. Wilson*, Dec. 8, 1836, 15 S. 221, aff. July 21, 1840, 1 Rob. 137)."—MOIR.

(x) It is fixed (contrary to Inst. l. c.) that the obligation may be continued beyond the seven years, also by renewal, or corroboration, or by such negotiations for that purpose as bar the plea on the statute; or it seems by decree within the seven years (Bell's Pr. 603, and cases cited). "The effect of interruption by decree or diligence is only to preserve to the creditor his claim against the cautioner for the debt, with such interest as shall have fallen due within the seven years" (Bell's Pr. 603; Com. ii. 358; *Irving v. Copland*, 1752, M. 11,043, Elch. "Cautioner," 21.).

(y) This is very doubtful (see L. Kilkerran in *Wallace v. Campbell*, 1749, M. 11,026; and L. Eldon in *Douglas Heron & Co. v. Riddick*, 1800, 4 Pat. 133; 1792, M. 11,032). Certainly a *separate* renunciation or promise to pay is effectual. As this limitation extinguishes the obligation, and does not merely limit the mode of proof as the other short prescriptions (Inst. § 24), payment of interest after the seven years does not perpetuate it. Such a payment being made in error may be recovered by the cautioner (*Carrick v. Carse*, 1788, M. 2931; *Yuille v. Scott*, Feb. 9 1830, 8 S. 485, aff. Sep. 15, 1831, 5 W. & S. 436).

(z) This principle of construction is repudiated (*Monteith v. Pattison*, Dec. 3, 1841, 4 D. 161; Shaw's Bell's Com. 278); and the cases cited as illustrations of it were really decided on the ground that they were not within the terms of the Act.

is not purified or the term of payment not come within the seven years, because no diligence can be used on these (*Borthwick v. Crawford*, 1715, M. 11,008). The statute excludes all cautionries for the faithful discharge of offices; these not being obligations in a bond, or contracts for sums of money. And practice has denied the benefit of it to all

Prescription of  
tutory  
accounts.

(25)

judicial cautioners, as cautioners in a suspension.(a) Actions of count and reckoning, competent either to minors against their tutors or curators, or *vice versè*, prescribe, by 1696, c. 9, in ten years after the minority or death of the minor.(b)

Prescription of  
holograph  
writings.

(26, 27)

10. By the before cited 1669, c. 9, holograph bonds, mis-sive letters, and books of account not attested by witnesses, prescribe in twenty years, unless the creditor shall thereafter prove the verity of the subscription by the debtor's oath.(c) It is therefore sufficient to save from the effect of this prescription that the constitution of the debt be proved by the party's oath after the twenty years; whereas in stipends, merchants' accounts, &c., not only the constitution but the subsistence of the debt must be proved by writing or the

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(a) *Gallie v. Ross*, March 4, 1836, 14 S. 647 (cautioner in a confirmation not entitled to plead limitation); so a cautioner for a composition in bankruptcy is not entitled to the benefit of the statute (*Cuthbertson v. Lyon*, May 23, 1823, 2 S. 291). Cautioners for a composition in bankruptcy are only liable for two years after the deliverance approving of the composition to creditors who do not produce their oaths as creditors till after their deliverance (19 & 20 Vict. c. 79, § 144). An illiquid debt, or one not payable within the seven years, does not fall under the Act (*Anderson v. Wood*, May 25, 1821, 1 S. 31; *Cuthbertson v. Lyon*, *cit.*; *Kerr v. Bremner*, March 5, 1839, 1 D. 618, *aff.* May 9, 1842, 1 Bell's App. 280); nor a bond executed and having its place of performance in a foreign country, on the ground that the limitation in this Act is a qualification of the terms of the contract, and cannot be imported, as a foreign prescription of the same kind would be, into a contract entered into with reference to the law of that country (*Alexander v. Badenach*, Dec. 23, 1843, 6 D. 323). The Act does not apply to mercantile guarantees (Bell's Com. i. 358), or to the acceptance of a bill "as security" (*Sharp v. Harrey*, M. App. "Bill of Exch.," 22).

(b) *Gowans v. Oswald*, Dec. 16, 1831, 10 S. 144.

(c) The Act says "the defender's oath," comprehending not only the original granter but his heir; and the proof required is of "the verity of the saids holograph bonds and letters and subscriptions in the compt-books" (see *Graham v. Cochran*, 1725, M. 10,992).

debtor's oath after the term of prescription. Some lawyers extend this prescription of holograph writings to all obligations for sums not exceeding £100 Scots which are not attested by witnesses; because, though these are in practice sustained, notwithstanding the Act 1540, c. 117, yet they ought not to have the same duration with deeds attested by witnesses.(d) Though in the short prescriptions of debts the right of action is for ever lost if not exercised within the time limited,(e) yet where action was brought on any of those debts before the prescription was run, it subsisted like any other right for forty years. As this defeated the purpose of the Act establishing these prescriptions, all processes upon warnings, spuilzies, ejections, or arrestments of or for payment of the debts contained in the Act 1669, c. 9, are, by the said Act, joined with 1685, c. 14, declared to prescribe in five years if not awakened within that time (see iv. 1, § 33).

11. Certain obligations are lost by the lapse of less than forty years without the aid of statute, where the nature of the obligation and the circumstances of parties justify it.(g)

Extinction of obligations by taciturnity.

(29)

(d) The Act is directed against writings "pursued for," and seems not to affect documents used to instruct a defence, unless perhaps in the case of compensation (Dickson on Evid. 415). It extends to all holograph writings on which an obligation can be founded (*Mowat v. Banks*, July 1, 1856, 18 D. 1093, Bell's Pr. 590). The operation of the prescription is excluded by action raised within the twenty years (*Simpson v. Brown*, 1792, Bell's 8vo Ca. 380); and probably by any acts inferring a personal exception against the defender pleading the rule, such as payment of interest, or recognition of the writing after the twenty years (*More's Notes*, 271; *Dickson on Evidence*, 417); or proceeding to plead on the merits of an action brought upon the writing, and omitting to state a plea on the statute at the proper time (*Wyse v. Wyse*, July 2, 1847, 9 D. 1405).

(e) The short prescriptions do not in general cut off the right of action, but merely limit the creditor as to his mode of proof. The septennial prescription of cautionary obligations, and the prescription of arrestments, are the only short prescriptions respecting debt where the right of action is cut off.

(g) Though the illustration here given of the extinction of rights by taciturnity is less appropriate than it was when Erskine wrote, the principle itself has often been applied. L. Glenlee says—"In questions of delay in the bringing forward of claims, there is a great difference between claims constituted by writing, however informal, and those other claims which arise out of facts and circumstances which may occur; and it does

Thus bills which are not intended for lasting securities, produce no action where the creditor has been long silent, unless the subsistence of the debt be proved by the debtor's oath; but the precise time is not fixed by practice (*Wallace v. Lees*, 1749, M. 1631; *Hamilton v. Hamilton*, 1757, M. 1636).<sup>(h)</sup> Thus, also, a receipt for bills granted by a writer

not appear that where there are opportunities of settling such claims as the latter they are to last for forty years. I suspect the statute of prescription had reference to written claims" (*Cullen v. Wemyss*, Nov. 16, 1838, 1 D. 32). Silence, however, "in itself is not taciturnity. In order to found the plea, the relation of the parties and the whole surrounding circumstances must be considered, and unless these, coupled with silence, are sufficient to infer a presumption of payment, satisfaction, or abandonment, there is no ground for the plea." (*Per L. J.-C. Inglis in Moncrieff v. Waugh*, Jan. 11, 1859, 21 D. 216; see *Thomson v. Smith*, Dec. 8, 1849, 12 D. 276; *Gourlay v. Wright*, June 23, 1864, 2 Macph. 1284; *Robson v. Bywater*, March 19, 1870, 8 Macph. 757.)

Prescription of  
bills.

(h) "The sexennial prescription of bills was introduced by the Statute 1772, 12 Geo. III. c. 72, § 37, and made perpetual as to bills and notes by the 23 Geo. III. c. 18. It is a statutory limitation of the mode of proof like the triennial prescription. This statute provides that no bill or note 'shall be of force or effectual to produce any diligence or action in Scotland, unless such diligence shall have been raised and executed or action commenced thereon' within six years after the sums in the said bills or notes become exigible. But it is competent at any time after the expiration of the six years to prove the debt, and that it is resting-owing, by the oath or writ of the debtor. The statute provides that the years of the creditor's minority are not to be reckoned. As the bill itself ceases to be obligatory after the six years, though the debt itself is not extinguished, the safe course for the party seeking to constitute the debt after the elapse of that period is to raise his action, not libelling on the bill, but on the debt, and this debt to be established by other proof than the bill (*Stirling v. Langs*, March 4, 1830, 8 S. 638). The extinction of the bill does not liberate the cautioner if the debt is raised up against the principal by his writ or oath after the six years (*Christie v. Henderson*, June 19, 1833, 11 S. 744). The mere raising of an action is not enough to interrupt the prescription, it must be called in Court, or at all events there must be citation. The diligence must be executed. A claim made upon the bill in a private trust will not save the bill from prescription; but a claim in a sequestration or multiple-pounding or other process of competition will. When the prescription is elided by writing dated after the six years, the debt is restored, subject to the forty years' prescription, if the acknowledgment be of that kind which could only be extinguished by that prescription. See

to his employer, not insisted upon for twenty-three years, was found not productive of an action (*Wemyss v. Clark*, 1749, M. 11,640). The prescriptions of the restitution of minors, of the benefit of inventory, &c., are explained in their proper places.

12. In the positive prescription, as established by the Act 1617, the continued possession for forty years,<sup>(i)</sup> proceeding upon a title of property not chargeable with falsehood, secures the possessor against all other grounds of challenge, and so presumes *bona fides*, *presumptione juris et de jure* (*Grant v. Grant*, Nov. 27, 1677, M. 10,876). In the long negative prescription *bona fides* in the debtor is not required; the creditor's neglecting to insist for so long a time is construed as an abandoning of his debt, and so is equivalent to a discharge.<sup>(k)</sup> Hence, though the subsistence of the debt

*Bona fides* presumed in the positive prescription.

(15)

It is not required in the long negative prescription.

*M'Indoe v. Frame*, Nov. 18, 1824, 3 S. 295, where it was also held that the acknowledgment of debt by one co-acceptor, though effectual to preserve the claim against himself, did not prevent the prescription running against others. The case of *Lipmann v. Don* (Jan. 20, 1836, 14 S. 241, rev. May 26, 1837, 2 S. & M'L. 682) fixes that this prescription is to be regarded not as part of the contract, but as part of the law of evidence, and therefore of the remedy, and is therefore dependent for its effect on the law of the country where the action is brought. The distinction is taken between the contract and the remedy. Whatever relates to the nature of the obligation (*ad valorem contractus*) is to be governed by the law of the country where it was made the *lex loci contractus*. Whatever relates to the remedy by suits to compel performance, or by action for a breach (*ad decisionem litis*), is to be governed by the *lex fori*, the law of the country to whose courts the application is made for performance or for damages. But this is probably true only where the prescription is one which limits the proof, but does not extinguish the debt. When, according to the law of the country where the contract was entered into, the prescription extinguishes the debt, it would seem that in an action raised in England or in this country after the lapse of the prescriptive period, the party might plead the foreign law of prescription as forming a part of the contract itself (*Huber v. Steiner*, 2 Bing. 202).”—MOIR. Thus our limitation of cautionary obligation is part of the contract, and does not apply to a foreign bond (*Alexander v. Badenach*, 1843, 6 D. 343; Savigny's Private International Law, 201, 218, *et seq.*).

(i) By 37 & 38 Vict. c. 84, § 34, twenty years' possession is sufficient, if following on an *ex facie* valid irredeemable title duly recorded.

(k) Trustees cannot plead prescription in support of a course of management inconsistent with the purposes of the trust (*Baird v. Magistrates*

should be referred to the debtor's own oath after the forty years, he is not liable (*Napier v. Campbell*, Dec. 7, 1703, M. 10,656).<sup>(l)</sup>

Prescription runs *de momento in momentum*.

(30, 34)

The positive prescription runs against the King.

Both prescriptions run against communities and against the church.

*Decennalis et triennalis possessio.*

13. Prescription runs *de momento in momentum*: the whole time defined by law must be completed before a right can be either acquired or lost by it; so that interruption made on the last day of the fortieth year breaks its course. Civil possession (ii. 1, § 12) has the same effects with natural in all questions of prescription, whether positive or negative. The positive prescription runs against the Sovereign himself, by the express words of the Act 1617, even as to his annexed property (1633, c. 12); but it is generally thought he cannot suffer by the negative.<sup>(m)</sup> He is secured against the negligence of his officers in the management of processes by express statute (1600, c. 14). The negative as well as the positive prescription runs against communities and hospitals, though their overseers are administrators only, and not proprietors; against the church, though churchmen have but a temporary interest in their benefices. But because the rights of beneficiaries to their stipends are liable to accidents through the frequent change of incumbents, thirteen years' possession does, by a rule of the Roman Chancery, which we have adopted, found a presumptive title in the beneficiary; *decennalis et triennalis possessor non tenetur docere de*

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*of Dundee*, Feb. 5, 1862, 24 D. 447, 1 Macph. H.L. 6; *University of Aberdeen v. Irvine*, Feb. 8, 1866, 4 Macph. 392, 6 Macph. H.L. 29).

(l) "Mr. Bell (Pr. 2008) says—'There must be a title, and such as to imply *bona fides*.' I find it difficult to understand in what sense Mr. Bell means to state his proposition; for it is fixed law that if a party takes a disposition *a non habente potestatem*, from a person who he knows has no right to the subject disposed, yet a possession of forty years following on this title will confer a complete and unchallengeable right on the disponent. Lord Balgray said—'The title of the defender is complete in itself, and he has had forty years' possession. Even granting that the titles had been derived *a non domino*, still he is entitled to plead prescription, whereby all inquiry into that fact or into *mala fides* is excluded.'"—MOIR. (See *Stair*, ii. 12, 5, *et seq.*). Lord Kames disapproves of the principle of the judgment in *Napier v. Campbell*, *cit*; (*Prin. of Eq.* 252, 356).

(m) Inconsistent with *Deans of Chapel Royal v. Johnstone*, Feb. 20, 1867, 5 Macph. 414, H.L., 7 Macph. 19.

*titulo*. But this is not properly prescription; for if by titles, recovered perhaps out of the incumbent's own hands, it shall appear that he has possessed tithes or other subjects to a greater extent than he ought, his possession will be restricted accordingly (*Rule v. Mags. of Stirling*, July 23, 1708, M. 11,002).<sup>(n)</sup> This right must not be confounded with that established in favour of churchmen by Act. S., Dec. 16, 1612 (ii. 9, 17), which is confined to church-lands and rents, and seems to constitute a proper prescription upon a possession of thirty years.

Prescription of church-lands and rents.

14. The clause in the Act 1617 saving minors from prescription is extended to the positive as well as to the negative prescription (*Blair v. Shedden*, 1754, M. 11,156); but the exception of minority is not admitted in the case of hospitals for children, where there is a continual succession of minors, that being a *casus insolitus* (*Heriot's Hospital v. Hepburn*, Dec. 17, 1695, M. 10,786). Minors are expressly excepted in several of the short prescriptions (as 1579, c. 81, 1669, c. 9); but where law leaves them in the common case they must be subject to the common rules.<sup>(o)</sup>

Does prescription run against minors?

(35)

15. Prescription does not run *contra non valentem agere*, against one who is barred by some legal incapacity from pursuing (*D. Lauderdale v. E. of Tweeddale*, Jan. 25, 1678,

It does not run contra non valentem agere;

(37, 36)

(n) The *decennalis et triennalis possessio* is available only to a possessor, and not only may be redargued by proof that the subject has not been held on a property title, but it ceases with possession. It differs from the possessory right founded in ordinary cases on seven years' possession, by conferring on the minister without written title a proprietary right, subject indeed to be elided by contrary proof, but which, if judicially declared, will be equivalent to a written title (*Cochrane v. Smith*, Dec. 16, 1859, 22 D. 252; *Greig v. D. Queensberry*, Nov. 21, 1809, F.C.). It can be pleaded only by an ecclesiastic, and not therefore by a preceptor (*Traill v. Dangerfield*, Feb. 21, 1870, 8 Macph. 579).

(o) "Only the minority of the *person in possession* is to be deducted. Thus, in the case of an entail, the minority of the heir actually in possession is deducted; but not that of the other substitutes so long as they are merely in expectancy (*M'Dougal v. M'Dougal*, July 10, 1739, M. 10,947; *Maule v. Maule*, March 4, 1829, 7 S. 527)."—MOIR. See *supra*, § 12, note (i). By § 34 of the Conveyancing Act, if there has been thirty years' possession, no deduction or allowance shall be made on account of the minority or legal disability of those against whom the prescription is used.

it does not  
commence till  
the debt can  
be sued for ;

It does not run  
against persons  
already in  
possession.

*Res extra  
commercium  
cannot be  
acquired by  
prescription,*

(14)

M. 11,193 ; for in such case neither negligence nor dereliction can be imputed to him.(p) This rule is, by a favourable interpretation, extended to wives who, *ex reverentia maritali*, forbear to pursue actions competent to them against their husbands (*Mackie v. Stewart*, July 5, 1665, M. 11,204) ; but every prescription runs against wives in favour of third parties. On the same ground, though by the Act 1617 prescription is said to commence from the date of the obligation, with the single exception of actions of warrandice, yet the words of that and other such statutes are so explained, or rather corrected, into an agreeableness with this rule, that the prescription runs only from the time that the debt or right could be sued upon. Thus, inhibition prescribes only from the publishing of the deed granted to the inhibiter's prejudice (*Moutray v. Hope*, 1682, M. 11,187). And in the prescription of removings the years are computed only from the term at which the defender is warned to remove (*L. Borthwick v. Scott*, Feb. 6, 1629, M. 11,076) ; though the Act 1579, c. 82, warrants the commencement of them from the date of the warning. Neither can prescription run against persons who are already in possession, and so can gain nothing by a pursuit. Thus, where a person who has two adjudications affecting the same lands is in possession upon one of them, prescription cannot run against the other during such possession. (See *Fraser v. M'Kenzie*, Nov. 26, 1728, M. 10,661.)

16. Certain rights are incapable of prescription. 1. Things that law has exempted from commerce (ii. 1, § 2). Of this sort were tithes, which being wholly appropriated before the Reformation to sacred uses, could not be made the property of private persons. But now they are *juris privati*,

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(p) It seems now to be fixed that the plea of *non valens agere* is no answer to the positive prescription (*Millar v. Dickson*, 1766, M. 10,937 ; *Wilson v. Campbell*, of Ottar, 1766, 5 B.S. 915, 926, aff. Feb. 10, 1770, 2 Pat. 193 ; *Macneill v. Macneal*, March 4, 1858, 20 D. 735). Even where the plea has effect, as in the negative prescription, there must, it seems, "be a legal incapacity to sue, not merely a difficulty to do so" (*Graham v. Watt*, July 15, 1843, 5 D. 1368, aff. July 21, 1846, 5 Bell's App. 172).

except in so far as they are actually destined for the maintenance of the clergy; and consequently are capable of the positive prescription, though they cannot be lost by the negative (see § 17). Things stolen or possessed by violence were so far *extra commercium* by the Roman law that they could not be acquired by usucapion even in the person of a *bonâ fide* possessor; but this and all other grounds of challenge seem to have been cut off by the *præscriptio longissimi temporis* (l. 3, 4, *C. de præscr.* 30 *vel* 40 *ann.*, 7, 39); neither does our statute of prescription make any exception in the case of stolen goods. but things stolen may.

2. *Res meræ facultatis*, e.g., a faculty to charge a subject with debts, to revoke, &c., cannot be lost by prescription (*L. Bimmerside v. Halyburton*, March 14, 1707, M. 10,727); for faculties may by their nature be exercised at any time. Faculties cannot be lost by prescription;

Hence a proprietor's right of using any act of property on his own grounds cannot be lost by the greatest length of time, though a neighbouring heritor should happen to be hurt by the exercise of it (ii. 9, § 10). (q) 3. Exceptions competent to a person for eliding an action cannot prescribe if they are founded on simple discharges; because discharges are intended to have no further operation, and cannot produce an action whereby the prescription may be interrupted. nor exceptions,

But where the exception is founded on a right productive of an action, e.g., compensation, such right must be insisted on within the years of prescription (ii. 4, § 5). if they be not productive of an action.

4. Obligations of yearly pensions or payments, though no demand has been made on them for forty years, do not suffer total prescription, but still subsist as to the arrears fallen due within that period (l. 7, § 6, *C. de præscr.* 30 *vel* 40 *ann.* 7, 39; *Lockhart v. D. of Gordon*, July 1730, M. 10,736); because prescription cannot run against an obligation till it be payable, and each year's pension or payment is considered as a separate debt. Obligations of yearly payments cannot prescribe;

But in bonds which carry a yearly interest, since the obligation is but one, and can be fulfilled at once, the interest is merely an accessory to the principal sum; and therefore if the creditor has been silent for forty years the obligation itself (13)

(q) *Leck v. Chalmers*, Feb. 3, 1859, 21 D. 408; *Gellatly v. Arrol*, March 13, 1863, 1 Macph. 592.

is prescribed; and consequently all the interests as accessories.(r).

nor the right  
of blood.

12, 8)

The negative  
prescription in  
heritage.

Feu-duties  
cannot be lost  
by the negative  
prescription;

nor parsonage  
tithes.

Interruption of  
prescription.

(39, 41, 38)

17. No right can be lost *non utendo* by one, unless the effect of that prescription be to establish it in another. Hence the rule arises, *juri sanguinis nunquam præscribitur*. One may, therefore, at the greatest distance from his ancestor's death, serve heir to him, if no other had served before him; for as that right is proper to him who has the character of heir, there can be no interest vested in any other person to found an opposition.(s) Hence, also, a proprietor of lands cannot lose his property by the negative prescription, unless he who objects to it can plead the positive, in terms of the Act 1617 (*Paton v. Drysdale*, July 20, 1725, M. 10,709.(t) On the same ground, a superior's right of feu-duties cannot be lost *non utendo*, because, being inherent in the superiority, it is truly a right of lands that cannot suffer the negative prescription except in favour of one who can plead the positive, which the vassal cannot do, being destitute of a title. This rule applies also to parsonage tithes, which are an inherent burden upon all lands not especially exempted, and from which, therefore, the person liable cannot prescribe an immunity by bare non-payment. But such vicarage tithes as are only due where they are established by usage may be lost by prescription (*L. Grant v. M'Intosh*, July 24, 1678, M. 10,763; ii. 10, § 5). In all these cases, though the radical right cannot suffer the negative prescription, the bygone duties not demanded within the forty years are lost to the proprietor, superior, or titular.

18. Prescription may be interrupted by any deed whereby the proprietor or creditor uses(u) his right or ground of debt. It is not only the proprietor or creditor himself who can interrupt, but his heir in the bare right of apparency. And even in interruption made by one who had only a

(r) *Henderson v. Burt*, Jan. 16, 1858, 20 D. 402.

(s) *Officers of State v. Alexander*, May 25, 1866, 4 Macph. 741.

(t) See above, § 4, note (c).

(u) "Or asserts" (Inst. l. c.; see the Bankruptcy Act, 1856, 19 & 20 Vict. c. 79, § 109).

putative title, the true creditor afterwards pursuing, though he derived no right from the interrupter, was found by a late decision entitled to the benefit thereof (*Lady Inveraw v. E. of Breadalbane*, 1746, M. 6554). In all interruptions notice must be given to the possessor of the subject, or the debtor, that the proprietor or creditor intends to sue upon his right. And, consequently, though registration of the ground of debt be in some respects considered as a decree, yet as the defender is not made a party to it, it is no interruption; nor citations which proceed on blank summonses (iv. 1, § 35), because these had no relation to any special ground of debt. All writings whereby the debtor himself acknowledges the debt, and all processes for payment brought, or diligences used against him upon his obligation, by horning, inhibition, arrestment, &c., must be effectual to interrupt prescription.<sup>(v)</sup>

19. Interruptions by citation upon libelled summonses, where they are not used by a minor, prescribe if not renewed every seven years, by 1669, c. 10. But where the appearance of parties, or any judicial act has followed thereupon, it is no longer a bare citation, but an action, which subsists for forty years.<sup>(w)</sup> By this statute citations for interrupting the prescription of real rights must be given by messengers; and, by 1696, c. 19, the summonses on which such citations proceed must pass the Signet upon a bill, and be registered within sixty days after the execution in a particular register appointed for that purpose.<sup>(x)</sup> And where interruption of real rights is made *vid facti*, an instrument must be taken upon it, and recorded in the said register; otherwise it can have no effect against singular successors.

20. Interruption has the effect to cut off the course of

Registration makes no interruption,

nor citation on blank summonses.

Interruptions by citations prescribe in seven years if not renewed.

(43, 44)

Requisites of interruption in the prescription of real rights.

Effect of interruption.

(45)

(v) Prescription of a bond may be interrupted by payment of interest (Kernack Nov. 27, 1874, 2 R. 156).

(w) Production of grounds of debt in the course of a sequestration has the same effect in interrupting prescription as an action against the bankrupt or trustee (19 & 20 Vict. c. 79, § 109); also lodging a claim in a multiplepinding or other process of competition (see Bell's Pr. 620).

(x) Now in the General Register of Sasines (31 & 32 Vict. c. 64, § 15).

Minority is not interruption.

prescription, so that the person prescribing can avail himself of no part of the former time, but must begin a new course commencing from the date of the interruption. Minority, therefore, is no proper interruption; for it neither breaks the course of prescription, nor is it a document or evidence taken by the minor on his right: it is a personal privilege competent to him, by which the operation of the prescription is indeed suspended during the years of minority, which are therefore discounted from it; but it continues to run after majority, and the years before and after the minority may be conjoined to complete it. The same doctrine applies to the privilege arising from one's incapacity to act (*supra*, § 15).

When partial interruption secures the whole right.

(46)

Interruption against the possessor of a barony.

21. Diligence used upon a debt against any one of two or more co-obligants preserves the debt itself, and so interrupts prescription against all of them, except in the special case of cautioners who are not affected by any diligence used against the principal debtor (1695, c. 5). In the same manner, a right of annualrent constituted upon two separate tenements is preserved as to both from the negative prescription by diligence used against either of them (*Lord Balmerino v. Hamilton*, June 21, 1671, M. 11,234). But whether such diligence has also the effect to hinder the possessor of the other tenement by singular titles from the benefit of the positive prescription, may be doubted; for no interruption can be said to be thereby made against the possessor; and if he continues his possession for the term of prescription he seems to be precisely in the case of the statute 1617. This is certain, that interruption made against the possessor of a barony by arresting or levying the maills and duties of any part of it, interrupts his prescription of the whole, for a barony is *nomen universitatis* or *unum quid* (ii. 6, § 7).

## NOTE A.

### PRESCRIPTION ON DOUBLE TITLES.

Ersk. Inst. iii. 7. 6.

“The case of *Elshieshiells* (*Edgar v. Maxwell*, 1736, M. 3089, 4325, Elch. ‘Serv. and Conf.’ 6, aff. Cr. St. & Pat. 334, 2 Ross’s L.C. 596) established this general principle, that where a party has right to lands under the last investiture, and also right under a personal title, the personal title is extinguished by his neglecting it and completing a title under the investiture, and *thereafter executing a new conveyance* of the lands differing from the destination in the personal right. This case was followed by *Harvie v. Craig-Buchanan* (Dec. 12, 1811, F.C.), and *Molle v. Riddell* (Feb. 13, 1811, aff. June 19, 1816, F.C.), where the party having in him the double title of heir of the investiture and heir under a personal title, made up his title under the old investiture, and then, instead of executing a new disposition of the lands, as in the cases of *Elshieshiells* and *Craig-Buchanan*, resigned the lands into the hands of the Crown, taking a new charter in favour of himself, his heirs and assignees whomsoever. It was held that he thus showed his intention of extinguishing or sopiting the personal right, and that no one could thereafter set up or found on the destination in the personal right. But supposing that the party holding the double title simply completes his title under the old investiture, passing over the personal right, and executes *no* new deed altering that investiture, is the personal right thereby extinguished? In the case of *Gray v. Smith and Bogle*, June 30, 1752 (Elch. ‘Provision to Husband and Child,’ No. 14), it was held that, where a party has right to lands as heir of the last investiture, and has also right under a personal title, and both titles are unlimited, the personal title is not extinguished by the party neglecting it and completing a title under the investiture; and the succession to the lands continues to be regulated by the personal title (*Durham v. Durham*, Nov. 24, 1802, M. 11,220, aff. 1811, 5 Pat. 482; *Snodgrass v. Buchanan*, Dec. 16, 1806, M. App. ‘Service of Heirs,’ 1; *Ogilvie v. Erskine*, May 26, 1837, 15 S. 1027).”

“These were cases of double titles, both *unlimited* in their character; and in such a case the law presumes that the party possesses

on all his titles so as to preserve his right in each, unless he has done some unequivocal act to indicate that he adopts one and repudiates the other. But it is otherwise where the one title is an absolute and fee-simple title, the other a limited and fettered one. When a party has right to lands under two different titles, the one limited and the other absolute, and completes his title under the latter—the unlimited deed—and possesses upon it for forty years, the former, though the preferable and governing title, is extinguished by the negative prescription (*M<sup>r</sup> Dougall v. M<sup>r</sup> Dougall*, the *Mackerston* case, July 10, 1740, M. 10,953, 3 Ross's L.C. 510). It is plain that if the law gives the party possessing the benefit of the presumption that he possesses on more titles than one, the ratio of that rule is that every man is presumed to possess on the titles which are *most advantageous* to him, and consequently, if it comes to be for his advantage to adopt one and to reject another, the law ascribes his possession to that which is most favourable to his interests."

"Suppose that he has the power of completing his title in two ways, one under a deed which leaves him a fee-simple proprietor, the other a proprietor subjected to the fetters of an entail, and therefore limited to an extent which practically reduces him to a position little better than that of a liferenter. It is evidently his interest to impute his possession to the fee-simple title, and to ignore the entail, and the law infers that he has done so if he completes his title in fee-simple, and possesses thereon for forty years."

"In the *Mackerston* case Henry Macdougall, neglecting the investiture under an entail executed in 1684, made up titles under an older destination in 1669 in fee-simple. He thereafter executed an entail which was challenged by the pursuer of the action. The action was resisted, on the ground that as the investiture of 1669 had been the sole title of possessing the estate since its date, the right upon that title was secured by the positive prescription, and that as no document had been taken on the entail of 1684, the defender's right under the deed had been lost by the negative prescription."

"The decision of the Court was, that the bond of tailzie having lain latent, and not having been claimed on, or any document taken thereon, for upwards of forty years from the date thereof, and the estate having been possessed by the Macdougals in virtue of the disposition of 1669 and the infestment following thereon,

they had the benefit both of the positive and negative prescription—in other words, that prescription was competent, and had been running in favour of the simple against the fettered or entailed title. The commentary of Lord Kilkerran is thus given:—‘As to the objection to the positive prescription, that it could not run while the heir in possession had right by both titles, although, where the investitures of the estate are simple and absolute, there are no habile terms of prescription in such case, because no man can prescribe against himself, yet where an investiture contains limitations and restrictions, the heir in possession on a different title, though likewise heir of the investiture containing the limitations and restrictions, may, even before the succession split, by the positive prescription, work off these restrictions.’”

“In the case of *Macdougall* the party in possession completed his feudal title under the fee-simple investiture as naturally the one most to his advantage. But what will be the result if he completes his title under neither right, and continues to possess on both simply in apparenay?”

“If the rule were followed out to what appear to be its most obvious consequences, it might not unfairly be maintained that, though he had given no apparent preference to one title over another, the law should presume the possession to have been on the fee-simple title rather than the entailed title, because it was on the whole the one most favourable to the interests of the possessor. But the actual result has been different, and on grounds which on examination appear to be sound.”

“In *Welsh Maxwell v. Welsh Maxwell* (June 21, 1808, F.C., H.L., Feb. 29, 1814, 6 Pat. App. 68) a party who had right to lands under two titles,—the one limited under an entail, the other absolute,—made up no title under either, but continued to possess upon apparenay, thus indicating no preference for either title. He possessed for more than forty years; and after his death the party who would have taken if the entailed destination was to prevail, claimed the estate.”

“The Court held that the entail was the *lex feudi*, the only title under which it was lawful, and under which therefore it must have been the presumed intention of the heir to possess. No act had been committed in contravention of its terms which could authorise the legal intervention of the heirs of entail. No change even of the destination had been attempted; and there was no obligation to make up feudal titles under the entail within a speci-

fied time. The only object of an action at the instance of the heirs would have been to have it formally declared that prescription was not running, a proceeding which the law did not require."—MOIR.

#### TIT. VIII.—OF SUCCESSION IN HERITABLE RIGHTS.

Successors,  
singular and  
universal.

(1-3)

Succession by  
special destina-  
tion, and legal  
succession.

Order of suc-  
cession in  
heritage.

(4-6)

Heirs-at-law.

Descendants.

Collaterals.

(7-10)

1. Singular successors are those who succeed to a person yet alive, in a special subject, by singular titles; but succession in its proper sense is a method of transmitting rights from the dead to the living. *Heritable rights* descend by succession to the heir properly so called; *moveable rights* to the executors, who are sometimes said to be heirs in moveables. Succession is either by special destination, which descends to those named by the proprietor himself; or legal, which devolves upon the persons whom the law marks out for successors, from a presumption that the proprietor would have named them had he made a destination. The first is in all cases preferred to the other, as presumption must yield to truth.

2. In the succession of heritage the heirs-at-law are otherwise called heirs general, heirs whatsoever, or heirs of line; and they succeed by the right of blood in the following order: First, descendants, whose preference before ascendants or collaterals is established by the universal consent of nations. The Romans divided the succession equally among all the immediate descendants of the deceased; but we, from our close attention to the feudal plan, prefer sons to daughters, and the eldest son to all the younger. Where there are daughters only, they succeed equally, and are called *heirs-portioners*. Failing immediate descendants, grandchildren succeed; and, in default of them, great-grandchildren; and so on *in infinitum*, preferring, as in the former case, males to females, and the eldest male to the younger.

3. Next after descendants, *collaterals* succeed; among whom the brothers-german of the deceased have the first place, *i.e.*, brothers both by father and mother; for the full

blood excludes the half-blood. But as in no case the legal succession of heritage is by the law of Scotland divided into parts, unless where it descends to females, the immediate younger brother of the deceased excludes the rest,—according to the rule, “heritage descends.” Where the deceased is himself the youngest, the succession goes to the immediate elder brother, as being the least deviation from this rule (*Grant v. Grant*, 1758, M. 14,874). If there are no brothers-german, the sisters-german succeed equally, then brothers-consanguinean (*i.e.*, by the father only) in the same order as brothers-german; and failing them, sisters-consanguinean equally. Next, the father succeeds, though by our ancient usage he was excluded (Craig, 321, § 46). (a) After him his brothers and sisters, according to the rules already explained; then the grandfather; failing him, his brothers and sisters; and so upwards, as far back as propinquity can be proved. Though children succeed to their mother, a mother cannot to her child, nor is there any succession by our law through the mother of the deceased; insomuch that one brother-uterine (*i.e.*, by the mother only) cannot succeed to another, even in that estate which flowed originally from their own common mother (*Lennox v. Linton*, Feb. 4, 1663, M. 14,867).

Ascendants.

No succession by the mother.

4. In heritage there is a right of representation, by which one succeeds, not from any title in himself, but in the place and as representing some of his deceased ascendants. Thus, where one leaves a younger son and a grandchild by his eldest, the grandchild, though farther removed in degree from the deceased than his uncle, excludes him, as coming in place of his father the eldest son. Hence arises the distinction between succession *in capita*, where the division is made

Right of representation in heritage.

(11, 12)

Successio in capita.

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(a) The question has arisen in this case whether, on the subsequent birth of a nearer heir, an heir who has taken at the ancestor's death is bound to denude in his favour. Contrary to the rule established in tailzied succession (*Stewart v. Nicolson*, Dec. 2, 1859, 22 D. 72; *Home v. Logan*, July 13, 1880, 7 R. 1137), it is decided that in succession *ab intestato* an heir who has taken and completed his title is not divested by the birth of a nearer heir, unless that nearer heir is *in utero* when the succession opens (*Grant v. Grant's Trs.*, Dec. 2, 1859, 22 D. 53).

*Successio in stirpes.*

into as many equal parts as there are *capita* or heirs, which is the case of heirs-portioners; and succession *in stirpes*, where the remoter heirs draw no more among them than the share belonging to their ascendant, or *stirps*, whom they represent; an example of which may be figured in the case of one who leaves behind him a daughter alive and two granddaughters by a daughter deceased. Though the right of succession does in no case fall to the mother of the deceased, nor to his relations by her, yet, as children succeed to their mother, therefore, in every case where the mother herself would have succeeded, had she been alive, her children also succeed as representing her.

Succession of heirs-portioners.

(13)

5. In the succession of heirs-portioners, indivisible rights, *e.g.*, titles of dignity, fall to the eldest sister. A single right of superiority goes also to the eldest; for it hardly admits a division, and the condition of the vassal ought not to be made worse by multiplying superiors upon him. Where there are more such rights, the eldest may perhaps have her election of the best; but the younger sisters are entitled to a recompense, in so far as the divisions are unequal, at least where the superiorities yield a constant yearly rent, *e.g.*, a yearly feu-duty.(b) The principal seat of the family falls to the eldest, with the garden and orchard belonging to it, without recompense to the younger sisters (*Pedie v. Pedies*, 1743, M. 5367); but all other houses are divided amongst them, together with the lands on which they are built, as parts and pertinents of these lands.

Heir of conquest,

(14-16)

6. Those heritable rights to which the deceased did himself succeed as heir to his father or other ancestor, get sometimes the name of *heritage* in a strict sense, in opposition to the *feuda nova*, or feus of conquest, which he had acquired by singular titles, and which descend not to his heir of line, but of conquest. This distinction(c) obtains only where two or more brothers or uncles, or their issue, are next in succes-

(b) The eldest heir-portioner is entitled to a blench superiority where there is but one, as a *præcipuum*, without giving any recompense for the casualties (*M'Neight v. Lockhart*, Nov. 30, 1843, 6 D. 128).

(c) The distinction between conquest and heritage is abolished (37 & 38 Vict. c. 94, § 37).

sion ; in which case the immediate younger brother, as heir of line, succeeds to the proper heritage, because that descends ; whereas the conquest ascends to the immediate elder brother (Q. Att. c. 88). It has no place in female succession, which the law divides equally among the heirs-portioners (*Carse v. Russel*, 1717, M. 14,873). Where the deceased was the youngest brother, the immediate elder brother, whether of the same or of a former marriage, is heir both of line and of conquest (*Lady Clerkington v. Stewart*, July 20, 1664, M. 14,867), contrary to the opinion of Craig, p. 336, ii. 15, 19.(d) An estate disposed by a father to his eldest son is not conquest in the son's person, but heritage ; because the son would have succeeded to it though there had been no disposition. The heir of conquest succeeds to all rights affecting land which require seisin to perfect them ; and consequently to dispositions or heritable bonds though they should not be actually followed by seisin (Hope, Min. Pr. p. 40 ; *D. Hamilton v. E. of Selkirk*, Jan. 8, 1740, M. 5554 & 5615).(e) But teinds go to the heir of line, because they are merely a burden on the fruits, not on the land (*Greenock v. Greenock*, Dec. 16, 1736, M. 5612 ; Elch. "Her. and Conq." 1).(f) Tacks do not fall under conquest, because they are complete rights without seisin (*Ferguson v. Ferguson*, June 23, 1663, M. 5605) ; nor personal bonds taken to heirs secluding executors, both for the reason just mentioned, and because they are heritable, not *ex sua natura*, but by the force of destination ; and therefore that heir is understood in the destination who is heir in the most proper sense (*D. Hamilton v. E. of Selkirk*, Jan. 8, 1740, M. 5615, Elch. "Her. and Conq." 3, 5 B.S. 684, 695, aff. 1 Cr. St. & Pat. 271).

has no place  
in female  
succession.

What is in-  
cluded in  
conquest.

(d) Conquest ascended but once, and in the succession of the heir of conquest was regarded as heritage.

(e) Also to heritable rights under trust-deeds (*Miller v. Miller's Trs.*, Jan. 19, 1831, 9 S. 295, 7 W. & S. 1 ; *Brown v. Campbell*, March 16, 1855, 17 D. 759).

(f) The just inference from the case of *Greenock* seems rather to be that where a person purchases the teinds of his own lands it will be held to have been done "*eo animo* to let them descend to the same heirs" (Elch. l. c., and "Her. and Conq." 3 *ad fin.* ; M'Laren on Wills and Succession, i. 77).

Heirship  
moveables.

(17, 18)

What is in-  
cluded in  
them :

Every defunct  
cannot trans-  
mit them ;

(17)

they fall to the  
heir of line.

Heritage  
cannot be  
settled by  
testament.

(20, 21)

7. The heir of line is entitled to the succession, not only of subjects properly heritable, but to that sort of moveables called *heirship*, which is the best of certain kinds (1474, c. 54).<sup>(g)</sup> This doctrine has been probably introduced that the heir might not have an house and estate to succeed to quite dismantled by the executor. The list of heirship-moveables contained in L. B., c. 125, is imperfect ; and indeed all such lists must be greater or less, according to the variety of moveables belonging to the deceased. In that sort which goes by pairs or dozens, the best pair or dozen is the heirship. There is no heirship in fungibles or things estimated by quantity, as grain, hay, current money, &c. To entitle an heir to this privilege the deceased must have been either (1.) a prelate ; (2.) a baron, *i.e.*, one who stood infeft at his death in lands (though not erected into a barony), or even in a right of annualrent ; or (3.) a burgess, not an honorary one, but a trading burgess of a royal borough, or at least one entitled to enter burgess in the right of his ancestor (*Cumming v. Cumming*, Nov. 22, 1698, M. 5399). Neither the heir of conquest nor of tailzie has right to heirship-moveables.

8. As to succession by destination, no proprietor can settle any heritable estate in the proper form of a testament ; not even bonds secluding executors, though these are not heritable *ex sua natura*.<sup>(h)</sup> But where a testament is in part drawn up in the style of a deed *inter vivos*, such part of

<sup>(g)</sup> The right to heirship-moveables is abolished (31 & 32 Vict. c. 101, § 160).

<sup>(h)</sup> This has been altered by 31 & 32 Vict. c. 101, § 20, *et seq.* ; and it is now competent for any owner of heritable subjects to settle the succession thereto after his death by testamentary writings. Where the deed is not in the terms required by the previous law, but would be an effectual *mortis causa* conveyance or bequest of moveables, it is equivalent to a general disposition of the lands, and creates an obligation on the grantor's successors to make up titles to the lands in their own persons, and convey them to the grantee or legatee. His title is completed by expeding and recording a notarial instrument, as provided by § 19, or by the older and more cumbrous modes formerly open to general disponees, *viz.*, voluntary conveyance by the grantor's heir, or action of constitution against the heir, and adjudication in implement (*supra*, ii. 3, 9 ; ii. 12, 20).

it may contain a settlement of heritage, though executors should be named in the testamentary part. The common method of settling the succession of heritage is by disposition, contract of marriage, or simple procuratory of resignation. And though a disposition settling heritage should have neither precept nor procuratory, it founds an action against the heir of line to complete his titles to the estate, and thereafter divest himself in favour of the donee. All heirs by destination may properly enough be called, by a general name, heirs of tailzie, from *tailler* to cut, because the lineal succession is cut off in their favour; but they are usually distinguished into heirs of tailzie and of provision. The appellation of tailzie, or entail, is chiefly used in the case of a land-estate, which is settled on a long series of heirs substituted one after another; whereas heirs pointed out in contracts of marriage, or in bonds containing clauses of substitution, are more commonly called heirs of provision. The first person called in the tailzie is the institute; the rest, the heirs of tailzie or the substitutes. Tailzies are frequently made in favour of the heir-male, *i.e.*, of the nearest legal heir to the granter who is himself a male, and whose propinquity is wholly connected by males, without the intervention of any females.<sup>(i)</sup>

9. *Tailzies*, when considered in relation to their several degrees of force, are either (1.) Simple destinations; (2.) Tailzies with prohibitory clauses; or (3.) Tailzies with prohibitory, resolutive, and irritant clauses. That is a simple destination where the persons called to the succession are substituted one after another, without any restraint laid on the exercise of their property. The heirs, therefore, succeeding to such estate are absolute fiars; and consequently may alter the destina-

Heirs of tailzie  
and of pro-  
vision;

how they  
differ.

Heir male.

Simple desti-  
nation

lays no re-  
straint on  
the heir.

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(i) Heir-male of the body limits the succession to heirs of the grantee in the direct line of descent. A destination to "heirs-male lawfully begotten" was construed to mean heirs-male of the body (*Braid v. Ralston*, Jan. 20, 1860, 22 D. 433). And "heirs-male" of a donee will be construed as meaning heirs-male of the body where, if used in its natural sense, it would defeat a substitution, or series of substitutions, to other members of the family (*Ker v. Innes*, June 20, 1810, 5 Pat. 320, M. App. "Tailzie," 13).

tion at pleasure. Nor can inhibition used against them by the next substitute cut off this right of fee; for inhibition supposes an antecedent obligation on the debtor, which that diligence is intended to secure to the inhibitor; whereas in a simple destination the several heirs lie under no obligation, and the substitutes have only the hope of succession.

Tailzies with prohibitory clauses cannot be altered gratuitously.

(23)

Inhibition may be served upon them by the substitute.

10. In tailzies with clauses prohibitory,<sup>(j)</sup> e.g., declaring that it shall not be lawful to the heirs to contract debts<sup>(k)</sup> or alien the lands in prejudice of the succession, none of the heirs can alien gratuitously; for a proper right of credit is thereby created to the several substitutes, who may, in the character of creditors, reduce such alienations upon the statute 1621, afterwards to be explained (*E. Callender v. Hamilton*, Jan. 28, 1687, M. 15,476). But the members of entail may contract debts which will be effectual to the creditors, or may dispose of the estate for onerous causes, since the fee subsists in their person; even though the substitutes as creditors by the prohibitory clause, have used inhibition on the tailzie to secure themselves against the effect of future contractions (*Bryson v. Chapman*, 1760, M. 15,511.<sup>(l)</sup>) In both these sorts the maker himself may alter

(j) See *infra*, § 14, note (e).

(k) "If contracting debt has not been prohibited, any creditor may, even in the case of a strict entail, by legal diligence render his debt real against the lands. The safest course is simply to prohibit the contraction of debt, without adding any other term; but it has been held that a prohibition to contract debt *on the lands*, or to *burden the lands with debt*, is sufficient (*Mackenzie v. Mackenzie*, May 23, 1823, 2 S. 331; *Nisbet v. Moncrieff*, June 10, 1823, 2 S. 381; *Lindsay v. M. of Huntly*, March 2, 1842, 2 D. 842, aff. 3 Bell, 254)—notwithstanding the doubts cast on this construction by Mr. Sandford, p. 269, founded mainly on an opinion given by Mr. John Clerk, afterwards Lord Eldin. In truth the prohibition against contracting personal debt cannot be imposed *cum effectu*; and the only interest which the succeeding heirs have in the matter is, that the debt shall never be laid on the lands, either by a direct deed affecting the lands, or by adjudication following on the personal debt. If the prohibition be such as to extend to all burdens on the lands, legal or voluntary, it is sufficient."—MOIR. (See also *Cathcart v. Cathcart*, March 31, 1863, 1 Macph. 759; *Wallace v. Wallace's Trs.*, June 10, 1880, 7 R. 902.)

(l) *Cathcart v. Cathcart*, July 18, 1831, 5 W. & S. 315; *Buchanan*

the tailzie; except (1.) Where it had been granted for an onerous cause, as in mutual tailzies (*Sharp v. Sharp*, Jan. 14, 1631, M. 4299); or (2.) Where the maker is expressly disabled, as well as the institute or the heirs (*Schaw v. Schaw*, 1715, M. 15,572.(m))

11. Where a tailzie is guarded with irritant and resolute clauses, (n) the estate entailed cannot be carried off by the

Tailzies with irritant and resolute clauses.

v. *Carrick*, Jan. 25, 1838, 16 S. 358, remitted May 30, 1842, 1 Bell's App. 368, aff. Sept. 25, 1844, 3 Bell's App. 342; *Lindsey v. Oswald*, Dec. 11, 1863, 2 Macph. 249, aff. March 21, 1867, 5 Macph. H.L. 12.

(25-28)

(m) The entailor cannot, however, make a gratuitous settlement of his estate so as to bind himself and exclude his creditors. Where there is no onerous consideration, though the settlement may, when completed by infestment and recording, be binding *inter hæredes* (*Douglas v. D. of Hamilton*, 1762, M. 4358, 4375), the estate continues liable for the entailor's debts contracted before his death (*Dickson v. Cunningham*, 1786, M. 15,534, Oct. 1, 1831, 5 W. & S. 657). An onerous entail, in which the restraining clauses include the granter as institute, bars gratuitous alienation even while it remains personal; after registration in the Register of Tailzies it is effectual against personal creditors of the institute in subsequent debts; and, after registration and infestment, against all creditors who have not made their debts real charges on the estate before the infestment (*Agnew v. Stewart*, 1784, M. 15,435, June 2, 1818, F.C., rev. July 31, 1822, 1 S. Ap. 320; Bell's Pr. 1747; Bell's Com. i. 48, 51). "As the first person in whose favour the conveyance is made is not accounted an heir, but a donee or institute, fetters or irritancies directed against the heirs of entail only will not reach him [*Edmonstone v. Edmonstone* (*Duntreath*), Nov. 24, 1769, M. 4409, 2 Pat. Ap. 255; *Campbell v. M. Breadalbane*, Nov. 23, 1838, 1 D. 81, aff. April 1, 1841, 2 Rob. 169]. A party will not be entitled to the privileges of an institute, if, being originally only a substitute, he comes *ex eventu*, as by the predecease of prior donees, to occupy the position of first holder of the estate. The fetters which affected the substitutes still attach to him (*Mackenzie v. Mackenzie*, Nov. 24, 1818, F.C., alt. May 13, 1822, 1 S. Ap. 150)."—MOIR.

(n) The irritant clause annuls the deed prohibited so far as it may affect the estate; the resolute forfeits the right of him who contravenes the prohibition (Bell's Prin. 1731). "The safest and simplest course is to make these clauses as general as possible, as, for instance, by saying, if the institute or heir of entail shall contravene the prohibitions, or any of them, his acts or deeds done in contravention shall be null, and he himself shall forfeit his right. When the irritant clause began with the words 'if he shall contravene and do in the contrary in any part of the premises,' or 'do in the contrary of the provisions,' or simply 'shall act

Their requisites.

debt or deed of any of the heirs succeeding thereto, in prejudice of the substitutes. It was long doubted whether such tailzies ought to be effectual, even where the superior's consent was adhibited; because they sunk the property of estates, and created a perpetuity of liferent. The first judgment confirming them was *V. Stormont v. Annandale's Crs.*, (Feb. 26, 1662, M. 13,994); and thereafter they were explicitly authorised by 1685, c. 22. By this statute the entail must be registered in a special register established for that purpose; and the irritant and resolute clauses(o) must be inserted, not only in the procuratories, precepts, and seisins by which the tailzies are first constituted, but in all the after conveyances thereof, otherwise they can have no force against singular successors (*Willison v. Crs. of*

and do *in the contrary*' these forms of expression were sufficient to apply the irritancies to the whole matters in the prohibitory clause (*Knight v. Knight*, Dec. 1, 1842, 5 D. 221; *Lord Wharncliffe v. Nairne*, Nov. 13, 1849, 12 D. 1, aff. July 5, 1850, 7 Bell's App. 132; *Gilmour v. Gordon*, March 24, 1853, 15 D. 587). The words 'shall come in the contrary hereof,' were held sufficient in *Hay v. Hay* (March 11, 1851, 13 D. 945); and the words 'do in the contrary thereof,' in *Maxwell v. Smith* (June 29, 1860, 22 D. 1341). But see *Speid v. Speid* (Feb. 21, 1837, 15 S. 618), which I have always considered an example of extreme strictness of construction; and I think some doubt is cast upon it by *Preston v. Heirs of Entail of Valleyfield* (Jan. 28, 1845, 7 D. 305). In the anxiety of conveyancers to make the irritancies complete, they have frequently resorted to the principle of enumeration, i.e., they proceed to enumerate the modes of contravention thus—either by selling, alienating, &c., or by altering the order of succession, or by contracting debt, or by any of the other modes which are struck at by the prohibitory clause, then they shall forfeit. In short, they try to run an exact parallel between the irritant clause and the prohibitory which preceded it. But in attempting to do this it frequently happened that they omitted to direct the special irritancies against some one act enumerated in the prohibitory clause, and the omission was fatal to the entail (*Bruce v. Bruce*, Jan. 15, 1799, M. 12,539, aff. June 18, 1801, 4 Pat. 231; *Horne v. Rennie*, Jan. 17, 1837, March 13, 1838; *Scott v. Scott*, Dec. 6, 1855, 18 D. 168; *Fairlie v. Cunningham*, May 3, 1857, 19 D. 596; and *Rollo v. Rollo*, Nov. 23, 1864, 3 Macph. 78).”—MOIR.

(o) The insertion in deeds of entail of these clauses has been unnecessary since 1848, and of the prohibitory clause since 1858, provided the deed authorise its being recorded in the Register of Tailzies. The insertion of the conditions in after-conveyances is also dispensed with since

*Dorator*, 1724, M. 15,371.(p) But a tailzie, even without those requisites, is effectual against the heir of the granter, or against the institute who accepts of it (*Willison v. Callender*, 1724, M. 15,369.(q) That part of the Act which requires the registration of tailzies, in order to their affecting singular successors, was found to have no retrospect to tailzies made prior thereto (*Cant v. Borthwick*, 1726, M.

1847, and of the destination of heirs since 1858 and 1860, provided the same are referred to as set forth at length in the recorded deed of entail (31 & 32 Vict. c. 101, §§ 9, 14).

(p) By the former law, the whole fetters required to be set forth expressly in the deed which contained the disposition to the heirs of entail, and it was not enough to refer to them in another deed recorded in the Register of Tailzies (*Gammell v. Cathcart*, Nov. 13, 1849, 12 D. 19, aff. Dec. 13, 1852, 1 Macq. 362; *Forbes v. Gammell*, May 14, 1859, 20 D. 917; *Cochrane v. Baillie*, March 9, 1855, 17 D. 659, aff. March 12, 1857, 2 Macq. 529; correct Bell's Prin. 1730, 1739). "The statute (1855) requires that the original deed of entail shall be recorded. It is not enough therefore to record the charter following on the deed, though it contains all the fetters (*Irvine v. E. Aberdeen*, 1776, M. App. 'Tailzie,' 1). But where a party executed a deed of entail in favour of a certain series of heirs, with a reserved power of adding additional heirs by a separate writing, the heirs so nominated become incorporated as it were with the original destination (*Stewart v. Porterfield*, May 15, 1821, 1 S. 9, remitted May 24, 1826, 2 W. & S. 369, aff. Sept. 23, 1831, 5 W. & S. 515). A settlement may even be effectually made by the proper dispositive words in favour of such heir as shall be named, not by the testator himself, but by some one whom he chooses, to trust and authorise for that purpose (*Snodgrass v. Buchanan*, Dec. 11, 1806, M. App. 'Serv. of Heirs,' 1; *Murray v. Fleming*, 1729, M. 4075)."—MOIR.

(q) An unrecorded entail is a bar to gratuitous alienations only. "The idea was at one time entertained in Scotland that the heir of entail might be bound, when he sold, to invest the price for behoof of the heirs whose succession he had disappointed; but it was found, 1st, that there were inextricable difficulties attending that view of a re-investment; and 2nd, that there appeared no warrant in the entail statute for any such claim of damages, or any other remedy competent to the heirs of entail beyond forfeiture of the contravener. Accordingly, the House of Lords held that the heir availing himself of the power of selling was under no obligation to reinvest the price in favour of the heirs of entail (*Stewart v. Fullerton*, Feb. 23, 1827, 5 S. 418, rev. July 16, 1830, 4 W. & S. 196; *Bruce v. Bruce*, *eod. die*, 4 W. & S. 240)."—MOIR. (*Montgomerie v. E. of Eglinton*, Jan. 22, 1842, 4 D. 425, aff. Aug. 18, 1843, 2 Bell's App. 149).

15,554. But this was reversed by a judgment of the House of Peers; and, indeed, the security of creditors calls for registration equally in all tailzies, and the Act 1690, c. 33, makes no exception (*Philip v. E. of Rothes*, 1758, M. 15,609, rev. 2 Pat. 52). It has been always an agreed point that the Act 1685 regulates the posterior transmissions, even of tailzies dated before it; so that in all these the irritant clauses must be repeated (*V. Garnock v. Master of Garnock, &c.*, 1725, M. 15,596). Retours upon general services are not properly transmissions of an estate; they only give right to unexecuted procuratories of resignation and precepts of seisin; and, therefore, they do not fall under that statute.(r)

- (29) 12. An heir of entail has full power over the entailed estate, except in so far as he is expressly fettered (*Hamilton v. Vss. Oxfurd*, 1767, M. 15,408); and as entails are an unfavourable restraint upon property, and a frequent snare to

(r) An apparent heir cannot make a valid entail (*M. Clydesdale v. E. Dundonald*, 1726, M. 1275); but one who has only a personal right to the lands can do so [*Napier v. Livingstone*, 1762, 5 B. S. 888; *Renton v. Anstruther*, Dec. 5, 1837, 16 S. 184, remitted March 1, 1842, 1 Bell's App. 129, aff. Aug. 18, 1843, 2 Bell's App. 214 (Opinions in 6 D. 230); *Fogo v. Fogo*, Feb. 25, 1840, 2 D. 651, aff. Aug. 18, 1843, 2 Bell's App. 195]. That an entail may be valid, the order of heirs in the destination must be different from those who would succeed by force of law (*Leny v. Leny*, June 28, 1860, 22 D. 1272); and an entail comes to an end in the person of the last substitute, if failing him it devolves on heirs whatsoever, and the last substitute may re-settle (*E. March v. Kennedy*, 1760, M. 15,412, aff. 2 Pat. 49; see below, § 14). Where the destination is to heirs whatsoever, the mere exclusion of heirs-portioners does not make a true tailzied destination (*Primrose v. Primrose*, Feb. 9, 1854, 16 D. 498; *Macgregor v. Gordon*, Dec. 1, 1864, 3 Macph. 148; see *Gordon v. Gordon's Trs.*, March 2, 1866, 4 Macph. 501). If the destination be limited to persons of the blood of the testator, as "to his own nearest of kindred," the entail will be valid (*Collow's Trs. v. Connell*, Feb. 23, 1866, 4 Macph. 465; see *Connell v. Grierson*, Feb. 14, 1867, 5 Macph. 379). An entail also comes to an end on the opening of the succession to heirs-portioners; for an intention to exclude division will not be inferred (*Macdonald v. Lockhart*, Dec. 22, 1842, 5 D. 372; *Collow's Trs. v. Connell*, cit.; *Mure v. Mure*, Feb. 16, 1837, 15 S. 581, aff. May 18, 1838, 3 S. & M'L. 237; *Farquhar v. Farquhar*, Nov. 28, 1838, 1 D. 121; *Primrose v. Primrose*, supra).

Destination in entail must be different from legal order of succession.

trading people, they are *strictissimi juris*; so that no prohibitions or irritancies are to be inferred by implication.<sup>(s)</sup> Hence, though all debts to be contracted by the heir should by the entail be declared null, but without irritating the right of the heir contracting (*Craig v. Craig*, *Cred. of Riccarton*, July 22, 1712, M. 15,494, rev. July 3, 1714, Robertson's App., 110),<sup>(t)</sup> or *vice versa*, though there should be a clause irritating the right of the heir who contracts, but without declaring the debts contracted null (*Baillie v. Carmichael*, July 11, 1734, M. 15,500), the Court will not interpose to supply the defect from presumed intention. For the same reason, a prohibition to alter the succession, though under an irritancy, does not disable the heir from contracting debt (*Campbell v. Wightman's Reps.*, 1746, M. 15,505); nor does a prohibition to contract debt hinder him from selling (*Sinclair v. Sinclairs*, 1749, M. 15,382.<sup>(u)</sup>

(s) "It has been said, if there be room for two meanings, one which would support, the other void the entail, the latter is to be adopted. This perhaps is too unqualified. Probably the best explanation of the rule is contained in the opinion of Lord Campbell in *Earl of Buchan v. Erskine*, June 23, 1842, 4 D. 1430, aff. Feb. 21, 1845, 4 Bell's App. 22—'If in the deed, in the part of it which is to be construed, the meaning is doubtful, if you cannot tell in which sense the settler used it, then you are to put that sense upon it which is favourable to freedom and against fetters. But if, looking to the deed itself, it is quite clear in what sense he used it, although when it appears elsewhere it may have another sense, you are to put upon it the sense in which he used it, though that sense may be for fetters and not for freedom. I apprehend that with regard to entails, unless there be some reason to apprehend a doubt as to the sense in which expressions are used, you are to give them their fair and grammatical meaning.' Certain it is that no inference from intention, however palpable that intention may be, is allowed. And so far is this strictness of construction carried, that the validity or invalidity of an entail may depend on the use of the word *nor* as a *disjunctive* term, instead of the word *or*, which is regarded as *copulative*; or in the presence or absence of the letter *s* in the word *provisions* (*Speid v. Speid*, Feb. 21, 1837, 15 S. 618); and in a recent case the whole question turned on this, whether the word *thereof* in an irritant clause had the same effect as the word *hereof* (*Maxwell v. Smith*, June 29, 1860, 22 D. 1341)."—MOIR.

(t) *Hepburn v. Hepburn*, 1758, M. 15,507, aff. 2 Pat. 17; *Mitchelson v. Atkinson*, June 15, 1831, 9 S. 841.

(u) But see § 14, note (b); 11 & 12 Vict. c. 36, § 34.

What deeds in-  
fer contraven-  
tion.

(30, 31, 32)

13. An heir who counteracts the directions of the tailzie by aliening any part of the estate,<sup>(w)</sup> charging it with debt, &c., is said to contravene. It is not the simple contracting of debt that infers contravention; the lands entailed must be actually adjudged upon the debt contracted (*Scot v. Scott's Crs.*, 1722, M. 3673). An heir may, where he is not expressly barred, settle a jointure on his wife not exceeding the terce; because the provisions of law are not excluded in tailzies by implication (*Cant v. Borthwick*, 1726, M. 15,554). But the settling provisions on children, being a positive deed of the granter, was found to import contravention, by *Borthwick v. Borthwick*, Feb. 1730, M. 15,556; which, however, was reversed upon appeal (Cr. St. & Pat. 53).<sup>(x)</sup> One

(w) "The general prohibition to alienate covers alienation in every form, not merely by absolute disposition, but by feuing or granting leases of more than ordinary duration. Since the *Queensberry* cases, the same effect has been given to the word *dispose*, though it was contended that this was applicable only to proper deeds of disposition (*D. Queensberry's Reprs. v. D. Buccleuch*, March 7, 1816, F.C., Feb. 5, 1818, F.C. rev. July 2, 1819, 1 Bligh, 339). Even leases of ordinary duration are alienations if, in addition to the stipulated rent, the heir of entail takes a grassum from the tenant (*Montgomery v. E. Wemyss*, June 12, 1822, 1 S. 483, aff. July 12, 1819, 6 Pat. App. 465, 548, 551). But a prohibition against selling alone is insufficient, because selling is only one mode of alienation, and the lands might be alienated by gratuitous deeds, or in some other form different from sale (*Russell v. Russell*, Dec. 7, 1852, 15 D. 192)."—MOIR. The estate, or part of it, may be sold for entailer's debts under the provisions of 6 & 7 Will. IV. c. 42; 11 & 12 Vict. c. 36, §§ 4, 6, 25, 26, 30; 16 & 17 Vict. c. 94, § 9.

Provisions to  
wife and child-  
ren under  
Aberdeen Act.

(x) "By 5 Geo. IV. c. 87 (Aberdeen Act), the heir of entail in possession is empowered to provide and infest his wife in a liferent annuity out of the entailed estates not exceeding one-third of the free yearly rent, after deduction of burdens already existing. Similar powers are given to an heiress of entail to make provision for her husband to the extent of one-half of the free rent. The statute further authorises bonds of provision to be granted by the heir in possession, binding succeeding heirs to pay, out of the rents, to the younger children not succeeding to the entailed estate sums of money, as follows:—In the case of one child, one year's free rent; in the case of two, two years' free rent; and in the case of three or more, three years' free rent. In estimating the yearly rent of the lands, which is to be taken as at the granter's death, all rents, such as game rents (though unlet), coal rents, and rents of salmon fishings, are included, but not the rent which might have been obtained for

might think that, by the words of the Act 1685, the contravener forfeits not only for himself but for the heirs of his body, where there is no express clause in the entail restricting it; but the more favourable opinion, which confines the penalty to the contravener, has been received by a decision (*Simpson v. E. of Home*, Jan. 6, 1697, M. 15,353).<sup>(y)</sup> Yet, for the greater security, a clause is generally inserted in tailzies, that the forfeiture shall not affect the descendants of the contravener, when such is the intention of the entailer. Before the next heir can take the estate on the contravention of the former he must declare the irritancy against the contravener; after which he is directed by the statute to serve himself heir to him who died last infeft in the fee, and did not contravene.<sup>(z)</sup>

Does the contravener forfeit for the heirs of his body?

How the heir serves upon a declarator of irritancy.

14. When the heirs of the last person specially called in a tailzie come to succeed, the irritancies have no longer any person in favour of whom they can operate; and consequently, the fee which was before tailzied becomes simple and unlimited in the person of such heirs (*Leslie v. Dick*, Dec. 15, 1710, M. 15,358(a)). By the late Act for abolishing

(32, 33)

In what cases an heir of entail may sell.

mansion-house and policies if let" (*Leith*, 24 D. 1059, June 10, 1862).—MOIR. Analogous powers of granting family provisions are conferred on heirs-apparent under certain conditions by 31 & 32 Vict. c. 84. Provisions to younger children under the Aberdeen Act, or otherwise, forming permanent burdens on the estate, may be charged on the fee of the estate by bond and disposition in security, with power of sale (11 & 12 Vict. c. 36, § 21; 16 & 17 Vict. c. 94, § 7; 31 & 32 Vict. c. 84, § 11).

(y) Even where the forfeiture is expressly applied to the descendants of the contravener, the irritancy must be declared during his life [*Fullerton v. Dalrymple (Bargany)*, June 20, 1825, 1 W. & S. 410, and App. 2; 1 S. App. 265; *Maxwell v. Maxwell*, Dec. 15, 1843, 6 D. 255, aff. July 13, 1846, 5 Bell's App. 165].

(z) It is enacted by 11 & 12 Vict. c. 36, § 40, that no irritancy committed by any heir of entail in possession shall invalidate in the person of any purchasers, or *bonâ fide* onerous creditors, any conveyances, deeds, or securities not inconsistent with the provisions of the entail granted by the contravener prior to the execution of the summons of declarator, in which decree is obtained in respect of such irritancy. Any substitute, however remote, may pursue a declarator of irritancy (Inst. l. c.; *Dundas v. Murray*, 1775, M. 15,430).

(a) See § 11, note (r).

ward-holdings (20 Geo. II., c. 50) the King may purchase lands within Scotland, notwithstanding the strictest entail; and (by Act 51 of the same year) where the lands are in the hands of minors or fatuous persons, his Majesty may purchase them from the curators or guardians. These Acts appear, by their preamble, to be limited to lands lying in the Highlands of Scotland; but the enacting words of both are general. By the first of the above quoted statutes, heirs of entail may sell to their vassals the superiorities belonging to the entailed estate; but in all these cases the price is to be settled in the same manner that the lands or superiorities sold were settled before the sale.<sup>(b)</sup>

Montgomery  
Act—Charging  
improvements.

(b) "The Montgomery Act, 10 Geo. III. c. 51, makes proprietors of entailed estates laying out money in inclosing, planting, or draining, or in erecting farm-houses and offices or out-buildings for the improvement of the lands, creditors of the succeeding heirs to the extent of three-fourths of their outlay; and this may be charged on the estate to the extent of four years' free rent. By § 27, expenditure for building or repairing mansion-houses or offices is allowed to the extent of two years' free rent; and by the Entail Amendment Act, 11 & 12 Vict. c. 36, expenditure on private roads is declared to be a permanent improvement in the sense of Montgomery Act. These powers have been subjected to a very strict and somewhat capricious construction."—MOIR. Additional powers, the most important of which is that of disentailing, have been conferred on heirs of entail by 11 & 12 Vict. cap. 36, and 16 & 17 Vict.

Entail Amend-  
ment Act.

c. 94. "Prior to the Entail Amendment Act, 1848, although an entail might be defective in one prohibition, or in one of its irritancies, it was held good in all other respects. Thus, if the entail was defective in the prohibition against selling, the heir in possession might sell; but he could not alter the order of succession, and *vice versa*. But now (§ 34), when any tailzie is defective in regard to any one of the prohibitions against alienation, contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail or of the investiture following thereon, such tailzie is invalid and ineffectual as regards all the prohibitions, but only as from the date of the statute. Any heir of entail (of lawful age) holding under an entail prior to 1848, may acquire the estate in fee simple if he is the only heir living for the time, and unmarried. If the party is not the only heir in existence, he may disentail with consent of the three next heirs for the time who are entitled in their order to succeed, or with the consent of the two next heirs, each of whom would be heir-apparent—that is, the heir whose right of succession nothing but death can prevent. In either case the heir next to the heir in possession must be twenty-five years of age (now

15. Rights, not only of land estates but of bonds (which last are called *quasi feuda* or *feuda nominum*), are sometimes granted to two or more persons in conjunct fee. Where a right is so granted to two strangers without any special clause adjoined to it, each of them has an equal interest in the fee, and the part of the deceased does not accrue to the survivor, but descends to his own heir. If the right be taken to the two jointly, and the longest liver and their heirs, the several shares of the conjunct fiars are affectable by their creditors during their lives; but on the death of any one of them the survivor has the fee of the whole, exclusive of the heir of the predeceased, in so far as the share of the predeceased remains free after payment of his debts (*Riddells v. Scott*, 1747, M. 14,878).<sup>(c)</sup> Where the right is taken to the two in conjunct fee, and to the heirs of

Rights taken  
in conjunct fee  
to strangers;

(34, 35)

twenty-one; see below), and not under legal incapacity. When the heir-apparent of the age and capacity specified shall have been born after 1st August, 1848, the estate may be disentailed with his consent alone; and when the heir in possession shall himself have been born on or after the same date, he is entitled to disentail without any consent (*Menzies' Lect.*, 3rd ed., 767). As to entails executed subsequent to 1st August, 1848, any heir born after that date may (§ 1), with the authority of the Court, execute an instrument of disentail; and any heir born before the date may disentail, provided he has the consent of the heir-apparent, twenty-five years of age, and subject to no legal incapacity. But the whole proceeding, including the authority of the Court to record the disentail, and also the actual recording, must be carried through by the party applying for the disentail. And if he dies before the disentail is thus completed, the whole proceedings fall and cannot be taken up and carried through by his representatives (*Robertson*, June 10, 1864, 2 Macph. 1168). A power of feuing and granting long leases is conferred by § 14.—*MOIR*. By the Entail Amendment Act, 1875 (38 & 39 Vict. c. 61), § 4, the nearest heir of entail may consent when twenty-one years of age, instead of twenty-five; by § 5 the consent of the nearest heir only is indispensable, the Court being authorised to assess the value of the expectancy of more remote heirs and to dispense with their consent.

(c) *Bisset v. Walker*, 1799, M. App. "Deathbed," 2. Where the right is conceived in favour of two strangers in conjunct fee and liferent, and their heirs, the two are equal fiars during their lives; but after the death of the first, the survivor has the liferent of the whole [more properly of the other half (*Bell's Pr.* 1709)]; and after the survivor's death, the fee divides equally between the heirs of both (*Inst.* l. c., and iii. 8, 73).

to father and  
son ;

one of them, he to whose heirs the right is taken is the only fiar ; the right of the other resolves into a simple liferent ; yet where a father takes a right to himself and his son jointly, and to the son's heirs, such right being gratuitous, and granted only in consequence of the natural obligation by which parents are bound to provide for their children, is not understood to strip the father of the fee, unless a contrary intention shall plainly appear from the tenor of the right.(d)

to husband  
and wife.

(36)

16. Where a right is taken to a husband and wife in conjunct fee and liferent, the husband, as the *persona dignior*, is the only fiar. The wife's right resolves into a

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(d) This contrary intention is not presumed, even from an express destination to the father in liferent and his children *nascituris*, or children not named in fee (*Frog's Children v. His Crs.*, 1735, M. 4262)—a decision which proceeded on the alleged principle that a fee cannot be *in pende*, and cannot therefore be given to persons not in existence (see *Lindsay v. Dott*, 1807, M. App. "Fiar," 1 ; *Devar v. M'Kinnon*, May 5, 1825, 1 W. & S. 161 ; *Mackellar v. Marquis*, Dec. 4, 1840, 3 D. 172). In *Mein v. Taylor*, June 8, 1827, 5 S. 779, aff. Feb. 23, 1830, 4 W. & S. 22, Lord Corehouse said :—" It is perhaps to be regretted that the point was so settled, because the plain intention of the maker is in consequence often sacrificed to a mere form of expression, and the feudal maxim might have been saved by supposing a fiduciary fee in the parent, as is done when the liferent is restricted by the word *allenary* or *only*. Upon this point, however, it is too late to go back ; but certainly the principle ought not to be extended to cases which have not yet been brought under it." In *Newlands v. Newlands' Crs.* (1794, M. 4295, aff. April 26, 1798, 4 Pat. 43), where the disposition was to the parent in liferent, for his liferent use *allenary*, and to the heirs of his body in fee, it was held that there was merely a fiduciary or trust fee in the donee for behoof of his children when they should exist. The interposition of a trust for retention of the fund also prevents such a destination from importing a fee in the father (*Mein v. Taylor*, *supra* ; *Ross v. King*, Jan. 22, 1847, 9 D. 1327). A destination to a father in liferent and children *nominatim* in fee, whether the father himself or a stranger be the disposer, receives effect according to its natural meaning (*Mackintosh v. Mackintosh*, Jan. 28, 1812, F.C.). But if in such a case the father, being disposer, reserves to himself full power of disposal, he has a fee (*Baillie v. Clark*, Feb. 23, 1809, F.C.). A mere faculty to settle conferred on the liferenter in a conveyance by another does not give a fee (*Morris v. Tennant*, June 7, 1853, 15 D. 716, aff. July 6, 1855, 18 D. 43).

liferent (*Johnstone v. Cuninghame*, 1667, M. 4199);(e) unless it be presumable from special circumstances that the fee was intended to be in the wife, *e.g.*, if the right flowed from her,(f) or has been taken to her assignees (*Fead v. Maxwell*, Feb. 4, 1709, M. 4240); or if the last termination of the settlement falls upon the wife's heirs (Stair, iii. 5, 51, vers. 3; Steuart's Ans. *voce* "Fee"); though our decisions seem to have laid but little stress upon this last presumption; see Dict. *voce* "Fiar."(g) Where a right of moveables is taken to husband and wife, the heirs of both succeed equally, according to the natural meaning of the words (*Bartilmo v. Hassington*, Feb. 2, 1632, M. 4222).

17. Heirs of provision are those who succeed to any subject in virtue of a provision in the investiture or other deed of settlement. The appellation is given most commonly to heirs of a marriage. These are more favourably regarded than heirs by simple destination, who have only the hope of succession; for heirs of a marriage, because their provisions are constituted by an onerous contract,(h) cannot be disap-

Heirs of provision.

(38, 40)

Heirs of marriage

cannot be disappointed by gratuitous deeds; but the father can contract debt,

(e) *Macgregor v. Forrester*, June 3, 1831, 9 S. 675, aff. April 13, 1835, 1 S. & M'L. 441; *Wilson v. Glen*, Dec. 14, 1819, F.C.; *Madden v. Currie's Trs.*, Feb. 22, 1842, 4 D. 749; *Fisher's Trs. v. Fisher*, Nov. 19, 1844, 7 D. 129.

(f) *Myles v. Calman*, Feb. 12, 1857, 19 D. 408. If, however, the subject was given as tocher, the fee is in the husband (Inst. l. c.; Bell's Prin. 1955).

(g) Where, in the absence of other indications, the right is given to the heirs of either of the parties, it is a simple settlement *in obligatione* giving so far a fee to the person whose heirs are favoured, that onerous deeds will be effectual, but not gratuitous (Bell's Prin. 1959).

(h) Such a deed has been said to be the most onerous deed known in the law of Scotland. "The principle is, that the wife is held on no other terms to have conveyed, as by marriage she does, all her moveable property in possession or possibility to the husband, nor even to have made him master of her person, and that the children would not have existed, but on the faith of the provisions made for them" (Bell's Com. i. 636). "The wife's own property may be preserved to her against her husband and his creditors by an exclusion in an antenuptial contract of the *jus mariti* and right of administration of her husband. Provisions are made for the wife out of the husband's property generally by annuity, sometimes heritably secured, as where lands are conveyed either to the marriage-contract trustees, or to the wife herself, who takes infertment

Antenuptial contracts.

unless he expressly restrain himself.

pointed of them by any gratuitous deed of the father; and they may sue him or his cautioner to purge encumbrances, or to make good their provisions in the event of his death (*Fotheringham v. Fotheringham*, Dec. 5, 1734, M. 12,929).<sup>(i)</sup> Nevertheless, as their right is only a right of succession which is not designed to restrain the father from granting onerous or rational deeds, he continues to have the full power of selling the subject, or charging it with debts, unless a proper right of credit be given to the heir by the marriage-contract, *e.g.*, if the father should oblige himself to infest the heir in the lands, or make payment of the sum provided against a day certain, or when the child attains a certain age (*Douglas v. Douglas and Drummond*, 1724, M. 12,910); or if the father should be restrained from the contracting of debt;<sup>(j)</sup> for such rights when perfected by infestment, or

on the conveyance. This, of course, renders her right perfectly secure. The mere personal obligation of the husband constitutes the wife a creditor of her husband, and entitles her to rank with other creditors in bankruptcy. 'A wife holding a provision importing a *jus crediti* in her favour will be ranked along with the other personal creditors for the value of her survivance, so as to have the dividend set aside, the immediate profits of it to be paid to her husband's creditors, and the dividend itself secured for her use in the event of her survivance' (Bell's Com. i. 637). If, however, the husband conveys to trustees a portion of his moveable estate, such as a personal bond, by antenuptial contract, and pays over the fund to the trustees for his wife's behoof, he may effectually exempt it from the diligence of creditors."—MOIR. A marriage-contract being intended to protect the wife against the husband, cannot be revoked *stante matrimonio* (*Torry-Anderson v. Buchanan*, June 2, 1837, 15 S. 1073; see also *Lady Ashburton's Tr. v. Cunninghame*, July 20, 1841, 3 D. 1288).

(i) They may do so without service to the father, being not only heirs but "*quodammodo* creditors to him" (Inst. l. c.). But where the subject sought to be recovered is a land estate settled upon the heirs of the marriage, the heir must serve in order to vest the estate in him, so that it shall pass to his heirs (*Moncreiff v. Moncreiff's Crs.*, 1765, 5 B.S. 909). But a right conceived so as to give a *jus crediti* (see below) will transmit to heirs without service (Bell's Pr. 1967), so long as it has not been implemented by investment or conveyance, in which case the right of the children becomes only a *spes successionis* (*ib.* 1987).

(j) Such a restriction cannot be enforced except by means of a formal entail (*Stewart v. Fullerton*, July 16, 1830, 4 W. & S. 196; *Bruce v. Bruce*, 4 W. & S. 236), though it may infer an intention to give a *jus crediti*.

secured by diligence, are effectual against all the posterior deeds of the father, even onerous (*Marjoribank's Crs. v. Marjoribanks*, 1682, M. 12,891). (k) Nothing but the hope of

(k) "The *criteria* for distinguishing the *jus crediti* of children from a mere hope of succession are thus explained by Lord Moncreiff in *Goddard v. Stewart's Children*, March 9, 1844, 6 D. 1018 :—'I understand the rule of law to be, that under antenuptial contracts the children have a *jus crediti* giving them such a right against the creditors of the father, if the provision is so conceived as that there was, or might be, a direct interest accruing to them in the lifetime of the father. As, for example, if the provision is made payable on the marriage or majority of the child, though such event should happen in the lifetime of the father ; or if the provision is made to bear interest from any such term which might be in his lifetime ; or if it is declared to be payable at the dissolution of the marriage, or to bear interest from that event, which may happen by the wife's predecease. (2.) But, on the other hand, if the provision is so conceived that the principal is not payable till after the father's death, and does not bear interest from any earlier term, and where no actual benefit or interest can be claimed or taken during his lifetime, there is no *jus crediti* vested in the children as against onerous creditors. In respect of the father and his heirs, they are no doubt creditors ; but in respect of his creditors they are merely heirs, having no more than a *spes successionis*. (3.) I understand it also to be a fixed rule, that it has no effect in conferring a *jus crediti* on the children, that instead of the husband being simply bound to pay a sum to the children, he engages to provide and secure a sum so payable. (4.) But if he actually lends out the money, or constitutes a trust, or grants heritable security to the wife or any other person in name of the children, with absolute warrandice, it constitutes a fee in the children which will prevail against onerous creditors.' As to the point involved in the last proposition, see *Herries, Farquhar, & Co. v. Brown* (case of *Clanranald*), March 10, 1833, 16 S. 943, which shows that if security be given for the provisions to children, although by the conception of the deed they are payable only after the father's death, a proper preference is at once conferred upon the trustee as representing the children from the moment the security is completed by infestment. It seems to be established by the opinions in *Wilson's Trs. v. Pagan*, July 2, 1856, 18 D. 1097, that children have a *jus crediti* entitling them to be ranked with onerous creditors wherever they have a right of action against the father to compel him to secure their provisions, even though they should not have actually followed up this right by the proper proceedings for securing implement ; but that they must actually have obtained security to entitle them to be preferred to onerous creditors in the competition ; and that children are not proper creditors unless they are entitled actually to have their father's powers of

*Jus crediti of children under marriage contracts.*

a right is created to such of the substitutes in a marriage-contract as are called after the issue of the marriage; for the parties contracting (the husband and wife) are interested no further than to provide their issue of that marriage. As to the other substitutes, it is a simple destination, alterable at pleasure.

Effect of provisions to children existing.

18. Though all provisions to children by a marriage-contract conceived in the ordinary form, being merely rights of succession, are postponed to every onerous debt of the

Postnuptial provisions to children.

administration abridged; for, says Lord Deas, 'he cannot secure them preferably against other creditors without securing them against himself.' Even where a *jus crediti* in favour of the children has been created by antenuptial marriage contract, the father, though in a certain sense debtor to his children, retains his full power of dealing with the subjects, and may onerously sell or burden them with his debts. Of course it would be different if he had actually conveyed lands to trustees in security of the provisions, as in *Clanranald's* case. A postnuptial contract made while solvent will stand good to the wife and children after insolvency (*Jeffrey v. Campbell*, May 24, 1825, 4 S. 32). In fact, the position of the children under a destination in a postnuptial marriage-contract seems, in a question with creditors, to be the same as under an antenuptial contract, except that the provisions in their favour are limited by their rationality, and that they will only be sustained to the extent to which they are reasonable, having regard to the amount of the grantor's estate. But their position is very different in some respects. In an antenuptial marriage-contract the provisions are onerous and irrevocable; in a postnuptial contract the provisions are gratuitous, and may be revoked, unless actual or constructive delivery of the deed for behoof of the grantees has taken place. In a recent case (*Thornhill v. M'Pherson*, Jan. 20, 1841, 3 D. 394) an opinion was expressed to the effect that if both the contracting parties, husband and wife, agree, they could legally put a postnuptial contract in the fire, and so bar entirely the right of children, which, under such a deed, was not considered to be onerous. However this may be, where provisions to children in a postnuptial contract bear to proceed from both spouses, they can not be revoked by the husband alone during his wife's lifetime; and it would rather seem that they can not be effectually revoked after her death. The death of either of the parties renders the right of the children irrevocable and indefeasible. This appears to be simply an application of the principle previously recognised in the case of legacies left by two persons in one deed—as in *Nicolson v. Ramsay*, M. App. 'Legacy,' No. 2; and *Anderson v. Garroway*, Jan. 27, 1837, 15 S. 435; see *Kidd v. Kidds*, Dec. 10, 1863, 2 Macph. 227."—MOIR. See next note (l).

granter, even to those contracted posterior to the provisions; yet where a father executes a bond of provision to a child actually existing, whether such child be the heir of a marriage or not, a proper debt is thereby created, which, though it be without doubt gratuitous, is not only effectual against the father himself and his heirs, but is not reducible at the instance even of his prior onerous creditors, if he was solvent at the time of granting it (iv. 1, § 13).<sup>(l)</sup> A father may, notwithstanding a first marriage-contract, settle a jointure on a second wife, or provide for the children of a second marriage; for such settlements are deemed onerous; but where they are exorbitant, they will be restricted to what is rational; and in all such settlements, where the provisions of the first marriage-contract are encroached upon, the heirs of that marriage have recourse against the father, in case he should afterwards acquire a separate estate which may enable him to fulfil both obligations (*Henderson v. Henderson*, Jan. 27, 1730, M. 12,892).<sup>(m)</sup>

The father's powers in a second marriage-contract.

(42)

(l) See last note. "Provisions made in favour of a wife by post-nuptial contracts, though effectual to a certain extent, stand in a different position from those contained in antenuptial contracts. 'In postnuptial contracts the wife and children are already wedded to the condition of the husband and father, and can take nothing against his creditors unless what he during his solvency can legally give away' (Bell's Com. i. 642). As to such provisions, it has been held—(1.) That to render them effectual at all, the husband must be solvent at the time of granting; (2.) that they will in that case be sustained to the extent of a moderate provision [to take effect after the husband's death (*Galloway v. Craig*, June 22, 1860, 22 D. 1211, rev. July 17, 1861, 4 Macq. 267; *Dunlop v. Johnston*, March 24, 1865, 3 Macph. 758, aff. April 2, 1867, 5 Macph. H.L. 22]; entitling the wife to rank as a creditor in the event of the husband's bankruptcy." —MOIR.

Postnuptial provisions to wives.

(m) "Although a father has destined his estate to the heir of the marriage by antenuptial marriage-contract, he retains the right of burdening that estate by granting rational provisions to his wife and his younger children; but these must not be so great as substantially to take away from the heir of the marriage the right which the marriage-contract had conferred upon him. It has also been held that where a husband had settled his whole means and estate on the wife and children of a first marriage, he may yet execute reasonable provisions in favour of the wife and children of a second marriage, and thus diminish the provisions to those of the first,"—MOIR. The powers of a father to

Provision of  
conquest in a  
marriage-  
contract.

(43)

Provision  
taken to heirs.

(47-49)

Provision to  
bairns.

19. In marriage-contracts the conquest, or a certain part thereof, is frequently provided to the issue; by which is understood whatever real addition shall be made to the father's estate during the marriage by purchase or donation. Conquest, therefore, must be free, *i.e.*, the debts must be deducted in the computation. What the husband succeeds to during the marriage as heir to an ancestor is not conquest. As in other provisions, so in conquest, the father is still *fiar*, and may therefore dispose of it for onerous or rational causes. Where heritable rights are provided to the heirs of a marriage, they fall to the eldest son, for he is the heir-at-law in heritage. Where a sum of money is so provided, the word *heir* is applied to the subject of the provision, and so marks out the executor who is the heir in moveables (*M'Dowall v. M'Dowall*, 1727, M. 12,844). Where an heritable right is provided to the *bairns* (or issue) of a marriage, it is divided equally among the children, if no division be made by the father; for such destination cuts off the exclusive right of the legal heir (*Kinloch v. Kinloch*, Jan. 11, 1678, M. 12,841).<sup>(n)</sup> No provision granted to bairns gives a

make provision for the wife and children of a second marriage out of a fund settled beyond his control, cannot be said to be distinctly defined (see *Guthrie v. Cowan*, Nov. 21, 1846, 9 D. 124; *Wilson's Trs. v. Pagan*, July 2, 1856, 18 D. 1097). The text seems correctly to state the law in regard to funds not actually secured, or provisions which do not restrict the father's administration of his estate. But even where the father is not divested, he cannot make a provision on his second marriage by a direct conveyance of subjects destined to the heirs of the first; he is only entitled to burden them (*Dykes v. Dykes*, Feb. 9, 1811, F.C.; see *Arthur v. Lamb*, June 30, 1870, 8 Macph. 928).

(n) "A destination of heritage to the heirs of the marriage will carry it to the eldest son, according to the ordinary rule of heritable succession; while a destination of heritage to the *children* or *bairns* of the marriage will carry the succession to all the children equally, with no preference in favour of the heir (Ersk. iii. 8, 48). In the case of a mixed succession, consisting partly of heritage and partly of moveables, a destination to the *heirs* and *successors* of A B has been held to carry the heritable succession to the heir-at-law, and the moveables to the younger children of A B (*Blair v. Blair*, Nov. 16, 1849, 12 D. 97). Where the expressions used are *heirs* and *bairns* procreated of the marriage, the rule appears to be this:—That if the subject be heritable it will go exclusively to the eldest son, the destination to the heir being held to

special right of credit to any one child as long as the father lives. The right is granted *familice*; so that the whole must indeed go to one or other of them; but the father has the power inherent in him to divide it among them in such proportions as he thinks best; yet so as none of them may be entirely excluded (*Campbell v. Campbell*, Dec. 16, 1738, M. 13,004); except in extraordinary cases; an instance of which in a provision, even to the heir of a marriage, may be seen in *Douglas v. Douglas*, 1724, M. 13,002.(o)

control the other term bairns or children; if it be moveable, it will go to all the children alike; if it be partly heritable and partly moveable, the heritable portion of the succession will go to the heir, and the moveable to the younger children (*Duncan v. Robertson*, Feb. 9, 1813, F.C.)."—MOIR.

(o) "Although the heir of provision can do nothing during his father's lifetime, yet the father may, with consent of the son, and as fiar of the property, validly execute deeds which would otherwise be reducible at the instance of the heir of the marriage. Again, the obligation of the father, being in favour of the heir of the marriage, who is the sole creditor in it, may be discharged by the party in right of the obligation. For the father might, if he had thought fit, have anticipated the period when he was bound to give implement of the obligation; he might have conveyed to the son during his lifetime, and if he had, the son would immediately have become fiar of the estate, and would be entitled to execute a new settlement of it in any manner he might think fit; and if the father could give, and the son receive, implement of the obligation in the father's lifetime, there seems no good reason why the son should not have the power of discharging the obligation in the marriage-contract, by accepting what he considers as equivalent to implement (*Trail v. Trail*, 1737, M. 12,985, Elch. 'Mut. Contr.' 5; *Routledge v. Carruthers*, May 22, 1812, F.C., Dec. 16, 1819, F.C., aff. July 6, 1820, 2 Bligh 692, 6 Pat. 597). But the heir cannot before the period arrives when it would be prestatable, assign or transfer his right to a third party, so as to constitute an effectual assignation, supposing him to predecease his parent. Although he so far possesses a *jus crediti* as to entitle him to take implement of the provision if offered, or to receive what he considers an equivalent, and to discharge the debtor in the marriage-contract obligation, he has nothing in his person which he can convey to a third party but a mere  *spes successionis*, dependent entirely on the accident of his survivance (*Maconochie v. Greenlees*, Jan. 12, 1780, M. 13,040)."—MOIR.—On the subject of apportionment, see *Crawcour v. Graham*, Feb. 7, 1844, 6 D. 589; *Smith Cuninghame v. Anstruther*, July 19, 1870, 8 Macph. 1013, 10 Macph.

Heir of provision may discharge, but cannot assign, his right during his father's life.

Different  
acceptations  
of the word  
heir.

(47)

20. Though by the general term of heir is understood, in the common case, the heir whom the law points out, yet where there has been an antecedent destination of a subject limiting the succession to a certain number of heirs, the general word heir, in all the posterior settlements, either of that subject or of any other intimately connected with it, signifies, *in dubio*, not the legal heir, but the heir of the investiture.<sup>(p)</sup> Thus, if one who has taken a right of lands to his heir-male should thereafter acquire a right of reversion of these lands to his heirs indefinitely, such reversion would go, not to the heir-at-law, but to the heir-male. Upon the same principle, if a superior of lands should afterwards acquire the property, or the proprietor any real right affecting them, such posterior acquisitions would not descend to the heir of conquest, though they were purchased by the ancestor, but to that heir to whom the first rights were provided (*D. Hamilton v. E. Selkirk*, Jan. 8, 1740, M. 14,935).

Substitution,  
(44)

what by the  
Roman law ;

what by ours.

21. As, by the Roman law, no man could name an heir to his own heir who was past pupillarity, their substitutions were really no more than conditional institutions; which meant only, that if the institute either could not or was not willing to take the succession, the substitute might; but where the succession was actually taken up by the institute, it devolved, after his death, on his own heir, and not on the substitute. With us, clauses of substitution, when inserted in tailzies, have been always understood to give the substitute a right, at what time soever the institute died, *quando-cunque defecerit*, although he had taken the succession before his death; and substitutions in testaments (*Christie v. Christie*, July 13, 1681, M. 8197), marriage-contracts, and bonds (*Gordon v. L. Drum & Auchlossin*, 1685, M. 14,849; *Anderson v. Shiells*, Nov. 17, 1747, M. 12,868; *Keith v. Innes*, June 26, 1634, M. 14,846), are also governed by the same

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(p) When an antecedent limitation gives the succession to a particular order of heirs, the general word "heirs" used in a subsequent deed must be understood not of the heir-at-law, but of the heir in the former destination. But the expression "heirs whatsoever" has a different meaning, and enlarges the destination to "heirs-at-law" (*Bell's Prin.* 1701).

rule, unless it be presumeable, from special circumstances, that no more is intended by the parties than a conditional institution (*Hamilton v. Wilson*, 1687, M. 14,850; *Dickson v. Maitland*, Feb. 23, 1697, M. 14,851); yet see Dirl. Doubts, v. "Substitution in Legacies." (q) A simple substitution gives the substitute no more than the hope of succession (*supra*, § 9); but where a prohibition is adjected, that no deed shall be done to hurt it, the institute cannot dispose of the subject unless for onerous or at least rational causes (*Graham v. Graham*, July 8, 1673, M. 4305, 4100). (r) A prohibition is employed in the substitution of children mutually to one another (*Macreadie v. Macfadzean's Executors*, 1752, M. 4402).

22. A clause of return is that by which a sum in a bond, or other right, is in a certain event limited to return to the granter himself, or his heirs. When a right is granted for onerous causes (*e.g.*, a bond for borrowed money) the creditor may defeat the clause of return, even gratuitously; because such clause is presumed to proceed merely from his own good will, and so is of the nature of a simple destination (*Robertson v. M'Kenzie*, Jan. 28, 1737, M. 9441). But where the sum in the right flows from the granter, as in bonds of provision, donations, &c., or where there is any other reasonable cause for the provision of return in his favour, the receiver cannot disappoint it gratuitously (*Drum-*

Provision of  
return;

(45)

its effects.

(q) "Where there is a doubt whether substitution or conditional institution is meant, the presumption in heritable succession is in favour of substitution; and the presumption has been extended to destinations in trust-deeds the main object of which was the settlement of heritable estate (*Ramsay v. Ramsay*, Nov. 23, 1838, 1 D. 83). A contrary rule holds in destinations of moveables. The whole questions as to conditional institutions and substitutions underwent full discussion in the case of *Fogo v. Fogo* (Feb. 25, 1840, 2 D. 957, rem. June 22, 1841, 2 Rob. 440, 4 D. 1063, August 18, 1843, 2 Bell's App. 195, 2 Ross's L.C. 36), which, although the point was not formally decided by the House of Lords, may be said practically to determine, that where the institute or any of the prior substitutes fail by the parties predeceasing the granter of the deed, the party next in the destination becomes a conditional institute, or direct disponee, entitled to use the precept or procuratory contained in the deed."—MOIR.

(r) See above, § 17.

*mond v. Drummond*, Jan. 13, 1679, M. 4338). Yet since he is *fiar*, the sum may be either assigned by him for an onerous cause, or affected by his creditors; nay, he may sue for payment, without giving security that the return shall be made effectual, since his faith was trusted at granting the right unless he be *vergens ad inopiam* (*Beatson v. Beatson*, June 10, 1747, M. 4345).<sup>(s)</sup>

All heirs represent the deceased universally, except heirs substituted in a bond, or heirs of provision.

(50, 51)

23. An heir is, in the judgment of law, *eadem persona cum defuncto*, and so represents the deceased universally, not only in his rights, but in his debts: in the first view he is said to be heir *active*; in the second, *passive*.<sup>(t)</sup> From this general rule are excepted heirs substituted in a special bond (*Fleming v. Fleming*, July 3, 1666, M. 14,000); and even substitutes in a disposition *omnium bonorum*, to take effect at the granter's death (*Mercer v. Scotland*, June 5, 1745, M. 9788); for such substitutes are considered as singular successors, and their right as a universal legacy, which does not subject the legatee *ultra valorem*. But heirs-male, or of tailzie, though their right be limited to special subjects,

<sup>(s)</sup> Further, if the clause of return be not in favour of the granter himself, but to a third party, it is held to be gratuitous in his person, and defeasible by the grantee or substitute. If, even in a gratuitous grant, it does not immediately follow the grant to the grantee and his heirs, but there are other substitutes prior to the clause of return, it may be defeated gratuitously by the grantee or his heirs, as the substitutes have no sufficient *jus crediti* to prevent the alienation, and the interest of the granter and his heirs has been by his own act still further postponed (*per* L. Medwyn in *Mackay v. Campbell's Trs.*, Jan. 13, 1835, 13 S. 240).

"There is a legal presumption or implied condition (especially in a settlement of one's whole estate) that the conveyance shall be effectual only *si testator sine liberis decesserit* (Inst. iii. 8, 46; *Hamilton v. Hamilton*, Feb. 8, 1838, 16 S. 478). And, besides the legal effect of a conveyance by a parent to a child as implying a conditional institution of that child's issue, there is, in direct substitutions after children of the testator, an implied condition that if a child should die leaving a *lawful* child, the substitution is not to take effect, but only if the institute should die childless" (Bell's Prin. 1776). It applies both in heritage and moveables, not only in the case of descendants, but also when the testator stood *in loco parentis* (*Rhind's Trs.*, Dec. 5, 1866, 5 Macph. 104).

(t) Or "to incur a passive title."

*Conditio si sine liberis decesserit.*

are nevertheless liable, not merely to the extent of the subject entailed or provided, but in *solidum*; because such rights are designed to carry an universal character, and so infer an universal representation of the granter.(u)

24. The heir of line is primarily(v) liable for the debts of his ancestor; for he is the most proper heir, and so must be discussed by creditors before any other can be sued. Next to him, the heir of conquest; because he also succeeds to the *universitas* of the whole heritable rights which his ancestor had acquired by singular titles. Then the heir-male, or of a marriage; for their propinquity of blood subjects them more directly than any other heir of tailzie, who may possibly be a stranger, and who, for that reason, is not liable till all the rest be discussed, except for such of the ancestor's debts or deeds as relate specially to the lands tailzied; as to which he is liable, even before the heir of line (Stair, iii. 5, § 17).(w) Heirs-portioners are liable, *pro ratâ*, for their ancestor's debts; but if any of them prove insolvent the creditor may, after discussing her, insist for her share

The order in which heirs are liable.

(52-53)

(u) The contrary has been fixed as the law, in conformity with the opinions of Dirleton, Stewart, and Bankton (see Inst. l. c.), viz., "that an heir of provision of a particular estate, such as an heir of tailzie, is not by his service universally liable, but only *in valorem*" (*Baird v. E. Rosebery*, 1766, M. 14,019, 5 B.S. 927, aff. 3 Pat. 651; Bell's Com. i. 659).

(v) "If a debt is made a burden upon a particular subject, the heir taking that subject is both primarily and ultimately liable for the debt; he must pay without relief against the other heirs [Inst. l. c.; *Ogilvie v. Dundas*, 1804, M. App. 'Discussion,' 1; May 22, 1826, 2 W. & S. 214; Bell's Prin. 1935]. Again, if the obligation takes a particular heir bound, that heir may be sued directly, and must be sued primarily for the debt. The liability of the other heirs only arises after he has been discussed; and unless there be something very special in the terms of the obligation, he must pay without relief against the other heirs, it being presumed that he takes the benefit, subject to the burden. When the debt is secured over two heritable subjects destined to different heirs, they are liable *pro ratâ* of the value of the subjects taken."—MOIR.—*Sinclair's Exrs. v. Fraser*, 1798, Hume 176.

(w) In the Inst. l. c. the author prefers the opinion of Bankton (iii. 5, 69), that the heir of entail should be first discussed. But it must be kept in view that an heir succeeding under a strict entail does not incur any passive representation of his predecessor (Inst. iii. 8, 51; *Syme v. Devoir*, 1803, M. 15,619; see § 23, note b).

Relief among  
heirs.

against the rest (*Burnet v. Lepers*, 1665, M. 5863), who will be liable, not indeed *in solidum*, but to the extent of the benefit accruing to them by the succession (*White v. Hay*, June 21, 1698, M. 14,683). Where an heir liable *subsidiarie* pays the ancestor's debt, action of relief is competent to him against that heir who is more directly liable; in respect of whom he is not co-heir, but creditor (iii. 4, § 10).

(54)

Apparent  
heirs, their  
privileges.

(45, 58)

25. Before an heir can have an active title to his ancestor's rights, he must be entered by service and retour. He who is entitled to enter heir is, before his actual entry, called apparent heir. The bare right of apparency carries certain privileges with it. An apparent heir may defend his ancestor's titles against any third party who brings them under challenge (*L. Roslin v. Fairbairn*, Jan. 19, 1627, M. 5233). Tenants may safely pay him their rents; and after they have once acknowledged him by payment, he may compel them to continue it (*Weir v. Drummond*, 1664, M. 5244).<sup>(x)</sup> The older decisions considered the rents not levied by an apparent heir, who was entered into possession, as his property; insomuch that they might not only be affected during his life by the diligence of creditors, but even confirmed after his death by his executors. Thereafter it was adjudged that, though apparency be a title of possession, the rents which the heir did not really receive, and to which he had made up no right by entry after his death, were, from the necessity of law, *in hæreditate jacente* of the person last infeft (*Balgony v. Hay*, 1688, M. 5247); but our judges have, by *Nicolson v. Houston* (1755, M. 5249), returned to the first doctrine—that the rents not uplifted by the apparent heir belong to his executors—upon this principle, that the heir's right to them arises, *ipso jure*, from his title to possess, and not from his actual possession.<sup>(y)</sup>

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(x) He may "sue not only those tenants for their rents who have once acknowledged him by payment, but all of them (Stair, iii. 5, 2);" Inst. l. c. An apparent heir cannot remove tenants holding on leases from the deceased proprietor (Inst. l. c.); but only those deriving right from himself (Hunter, L. and T., 4th ed., ii. 3). It is sufficient, however, if the proprietor be infeft before decree in the removing (*Scott v. Fisher*, Feb. 2, 1832, 10 S. 284; *Mackintosh v. Munro*, Nov. 23, 1854, 17 D. 99).

(y) The doctrine here stated is correct; though the question is stated

26. As an heir is, by his entry, subjected universally to his ancestor's debts,<sup>(z)</sup> apparent heirs have therefore a year (*annus deliberandi*)(a) allowed to them from the ancestor's decease to deliberate whether they will enter or not (*tit. C. de jure delib.*, 6, 30), till the expiring of which, though they may be charged by creditors to enter, they cannot be sued in any process founded upon such charge.(b) Though declaratory actions, and others which contain no personal conclusion, may be pursued against the apparent heir without a previous charge, action does not lie, even upon these, within the year, if the heir cannot make the proper defences without incurring a passive title (*Dewar v. Paterson*, June 26, 1667, M. 2171). But judicial sales, commenced against an ancestor, may be continued upon a citation of the heir, without waiting the year of deliberating, by special Act of Sederunt (Nov. 23, 1711, § 5). This *annus deliberandi* is computed, in the case of a posthumous heir, from the birth of such heir. An apparent heir who, by intermixing with the estate of his ancestor, is as much subjected to his debts as if he had entered, can have no longer a right to deliberate whether he will enter or not (*Hamilton v. Bonar*, 1667, M. 6873).

*Jus deliberandi*

(54, 55)

protects the heir from suits for a year.

An apparent heir intermixing loses his *jus deliberandi*.

27. The apparent heir may, even after his year is expired, sue havers, i.e., custodiers or possessors, for exhibition of all writings pertaining to his ancestor, and also of all deeds granted by him, whether to those of his own family or to strangers (*Spark v. Barclay*, 1715, M. 3988);(c) that he

An apparent heir may pursue exhibition even after the year.

(56, 57)

as still unsettled in the Inst. l. c. The decision there referred to as overruling *Nicolson v. Houston* was afterwards reversed in the H. of L., and the rule last mentioned in the text firmly fixed (*Hamilton v. Hamilton*, 1760, M. 5253, rev. 1767, 2 Pat. 137; Bell's Com. i. 99).

(z) Under 37 & 38 Vict. c. 94, § 12, an heir is not liable beyond the value of the estate of his ancestor to which he succeeds, or beyond the extent of his intrusions before renouncing the succession.

(a) Now practically six months (31 & 32 Vict. c. 101, § 61).

(b) The objection that diligence was used within the *annus deliberandi* is not personal to the heir, but may be pleaded by creditors having an interest (*Summers v. Simson*, 1757, M. 6882).

(c) The defender's infestments on an absolute conveyance from the ancestor excludes the heir's right to exhibition (*Cathcart v. E. Cassillis*,

may thereby be enabled to balance his ancestor's estate with his debts. An apparent heir who has renounced his succession cannot sue for exhibition against that creditor at whose suit he was charged to enter; because his renunciation upon the charge imports an approbation of the charger's right (*Richardson v. Livingston*, Jan. 1721, M. 3989). But such renunciation does not exclude exhibition against another creditor, its effect being restricted to the special debt which was the ground of the charge (*Waird v. Waird*, Jan. 8, 1675, M. 3983. For other privileges of apparenry, see ii. 6, § 23; ii. 9, § 33; ii. 12, § 27).

Service of heirs

(59-62)

proceeds on a  
brief,

which is re-  
tourable.

28. All services proceed on brieves from the chancery, which are called Brieves of Inquest, and have been long known in Scotland (St. Rob. III. c. 1). The judge to whom the brief is directed is required to try the matter by an inquest of fifteen sworn men; which inquest cannot sit till fifteen days after the brief has been proclaimed (1503, c. 94) at the market-cross of the head borough (see § 29). And this proclamation to all and sundry supersedes the necessity of citing any particular person as party to the service. The inquest, if they find the claim verified, must declare the claimant heir to the deceased by a verdict or service, which the judge must attest. The brief of inquest was from the beginning retourable, *i.e.*, it behoved the judge to return the brief, with the service proceeding on it, to the chancery (arg. St. Rob. III. c. 1, § 3); but it would appear that, from that period to the year 1550, the obtainer of the brief got the service delivered to him, either by the judge or by the chancery; for many of our oldest families have at this day in their keeping the authentic services of their ancestors, with the seals of the inquest appended to them. And hence a principal service dated before 1550 was sustained though there had been no evidence of its having been retoured to the chancery (*Lord Elphinston v. E. of Mar*, Feb. 17, 1624, M. 2217, 2218, 6685). But from that time no service has

1795, M. 3993, aff. May 31, 1825, 1 W. & S. 239). But this effect is not given to a deed which still leaves the formal title in the granter's heirs, such as a general disposition to trustees (*Liddell v. Wilson*, Dec. 19, 1855, 18 D. 274).

been deemed complete till it be retoured (*Mackintosh v. Mackintosh*, Feb. 2, 1698, M. 14,431); after which, the heir served may, on his application, get an extract thereof from the chancery; but the service is complete though such extract should not be demanded. The brief of mortancestry (*de morte antecessoris*) was the ground of a proper action, and related to the particular case where the heir was excluded from the possession of the lands by the superior, or other person pretending right to them, whom therefore it was necessary to call as a party to the suit (R. M., l. 3, c. 28 *et seq.*; Q. Att. c. 52).<sup>(d)</sup>

Brief of mort-  
ancestry.

29. The service of heirs is either general or special. A general service vests the heir in the right of all heritable

General ser-  
vice.

(63-65)

(d) This procedure was abolished in 1847 by the Service of Heirs Act, 19 & 11 Vict. c. 47, substantially re-enacted by 31 & 32 Vict. c. 101, § 27 *et seq.* General service is now expedite by presenting to the Sheriff of Chancery, or to the Sheriff of the county in which the deceased had his domicile at his death, a petition setting forth the death of the ancestor, the date of death, the ancestor's domicile, and the claimant's propinquity. Special service is expedite by presenting to the Sheriff of Chancery, or the Sheriff of the county in which the lands lie, a petition setting forth the ancestor's death and the date thereof, the description of the subjects, which may be by reference, the ancestor's title, the claimant's propinquity, and in the case of an heir of provision the deed under which he claims. Service must be expedite before the Sheriff of Chancery, when the lands lie in different counties, or where, in the case of a general service, the ancestor's domicile was abroad, or unknown (the petitioner not being obliged to prove the domicile if the ancestor died ten years before the date of presenting the petition); and this Court may be resorted to in any case, at the option of the petitioner. After publication in the manner prescribed by the Act (§ 30), and the elapse of the *induciae* (fifteen to thirty days, § 33), evidence is taken either by the Sheriff himself, or by the provost or bailies of any city or burgh, or any justice of peace or notary-public, or any commissioner specially appointed by the Sheriff. The Sheriff then pronounces decree, which is equivalent to the verdict of a jury under the brieve of inquest. All proceedings are transmitted to the Director of Chancery, by whom the decree of service is recorded and extracted (§§ 36, 37). In the case of a general service no opposition is competent except by way of presenting a competing petition (when both may be appealed at once to the Court of Session), or on the ground that the succession is not open (Bell's Prin. 1853). In the case of a special service, any one having a feudal right to the subject may appear and object (Inst., Ivory's Note, 492).

subjects(*e*) which either do not require seisin, as reversions, bonds secluding executors, heirship moveables,*(f)* &c., or which have not been perfected by seisin in the person of the ancestor, as dispositions, heritable bonds, &c.; but it can carry no right clothed with infeftment, not even the personal obligation contained in a right of annualrent on which seisin had followed, so as to be a title to demand payment from the debtor (*Lord Halkerton v. Drummond*, Jan. 1729, M. 14,436). The brief on which a general service proceeds may be directed to any judge-ordinary (*L. Caskyben, petr.*, March 5, 1630, M. 14,420), and must be proclaimed in the jurisdiction where it is to be served. A special service, followed by seisin, vests the heir in the right of the special subjects in which the ancestor died infeft;*(g)* and the brief must be directed either to the Sheriff of the county or bailie of the borough where the subjects lie; or, by special warrant of the Court of Session, to delegates, generally the macers of the Session,*(h)* to whom the Court in cases of difficulty join one or two of their own number as assessors. The proclamation of this brief must in all cases be made at the head-borough of the jurisdiction where the lands lie. The style of all briefs, whether a general or a special service be intended, is the same, and contains seven distinct heads, which the inquest is commanded to answer. Where the heir claims to be served in special, all of them must be answered; but in a general service the inquest answers only the two first.

Special service,

sometimes  
committed to  
delegates.

Heads of the  
brief answered  
in a general  
service.

(66)

30. The two questions to be answered in a general service are, first, Whether the ancestor died at the peace of the sovereign?*(i)* This is inquired into on account of the *fisk*; for where one dies in rebellion, his whole estate forfeits to the Crown; but the affirmative is presumed, unless actual rebellion be proved. Rebellion, in consequence of a denun-

(*e*) A personal right to every right in land is now descendible to heirs, and vests in the heir by the fact of survivorship (37 & 38 Vict. c. 94, § 9).

(*f*) These are now abolished (*supra*, § 7).

(*g*) See below, § 35, note (*o*) and § 37, note (*t*).

(*h*) This jurisdiction was taken away by 1 & 2 Geo. IV. c. 38.

(*i*) This question is no longer put, see note (*d*).

ciation upon letters of horning, is no bar to the service (*Seaton*, Nov. 21, 1626, M. 2208). The second question is, Whether the claimant be the next and lawful heir to the deceased? The legitimacy is presumed; but the propinquity must be proved, either by witnesses, or, if it be remote, by proper evidence in writing. The particular degrees by which it is connected ought to be specially set forth in the claim and service (*E. Cassillis v. E. Winton*, July 22, 1629, M. 14,423). That degree which is proved is presumed to be the nearest, unless the proof of a nearer be instantly offered; and the remotest degree excludes the Crown's right as *ultimus hæres*.

31. In a special service the claimant must prove upon the first head above mentioned the precise time of the ancestor's death, that it may be known how long the lands have been in non-entry; and that the deceased stood infeft at his death in the lands contained in the claim, which is instructed by his seisin. The following five heads are also inquired into in a special service:—(1.) Of what superior the lands are held *in capite*, or immediately. (2.) By what manner of holding. (3.) What their extent is, both old and new. This last serves to fix the rate of the superior's casualties, which is governed by the new extent; and perhaps was also intended to ascertain the heir's proportion of public subsidies, which, till 1649, was regulated by the old extent (ii. 5. 16). As the non-entry, due out of the lands formerly holden ward of the Crown, is now proportioned by the valued rent, the late Act for abolishing ward-holdings provides that the valuation shall also be inserted in the retours of such lands. (4.) Whether the claimant be of lawful age. This head was formerly necessary in ward-holdings, in which the superior was not bound to enter the heir while he was minor; but now that ward-holdings are abolished, the question must be always answered in the affirmative. The last head, In whose hands the fee has been since the ancestor's death, serves to show whether non-entry be due; for if the lands have been possessed by a tercer or liferenter, it is excluded (ii. 5, § 20).<sup>(j)</sup>

Heads in a  
special service.

(67)

(j) These particulars are not now required; see above, § 28, note (d).

Entry of an heir by inventory.

(68)

32. If an heir, doubtful whether the estate of his ancestor be sufficient for clearing his debts, shall at any time within the *annus deliberandi*, exhibit upon oath a full inventory of all his ancestor's heritable subjects to the clerk of the shire where the lands lie; or, if there is no heritage requiring seisin, to the clerk of the shire where he died; and if, after the same is subscribed by the Sheriff or Sheriff-Depute, the clerk, and himself, and registered in the Sheriff's books, the extract thereof shall be registered within forty days after expiry of the *annus deliberandi*, in the general register appointed for that purpose, his subsequent entry will subject him no farther than to the value of such inventory (1695, c. 24; borrowed from l. 22, §§ 2, 3, 4, C., *de jure delib.*, 6, 30). If the inventory be given up and registered within the time prescribed, the heir may serve on it, even after the year (*Mackay v. Sinclair*, Feb. 11, 1708, 5331). (k)

\*  
Creditors need not rest on an estimation of the inventory by witnesses.

(70, 69)

33. There is good ground to conclude, both from the rubric and tenor of this statute, that it was designed, not to deprive creditors of the right of making the most of their deceased debtor's estate, but merely to save the heir from an universal representation. Creditors, therefore, are not obliged to acquiesce in any presumed value that may arise from the estimation of witnesses, but, if they be real creditors (1681, c. 17), may bring the estate to a public sale, in order to discover its true value; since an estate is always worth what can be got for it (*Heirs of Strachan v. Creditors*, July 12, 1738, M. 5348). An heir by inventory, as he is in effect a trustee for the creditors, must account for that value to which the estate may have been improved since the death of the ancestor (*Aikenhead v. Russel*, July 6, 1727, M. 5344); and he must communicate to all the creditors the *eases* he has got in transacting with any one of them (*Aikenhead v. Russel*, Dec. 1725, M. 5342). He may, upon a sale, pay the price to the creditors who first apply (*Veitch v. Young*, June

An heir by inventory is a trustee for the creditors.

(k) An heir, by specification annexed to his decree of general service, might now limit his liability for the deceased's debts and deeds to the extent and value of the lands specified (31 & 32 Vict. c. 101, § 49); but all such procedure is superseded by § 12 of the Conveyancing Act; see *supra*, § 26, note (z).

1733, M. 5345); but a general decree obtained by one creditor, finding the heir liable to the extent of the inventory, gives him no preference over the others while the subject is *in medio* (*Lawson v. Udny*, Nov. 28, 1738, M. 5348).

34. Practice has introduced an anomalous sort of entry without the interposition of an inquest, by the sole consent of the superior, who, if he be satisfied that the person applying to him is the next heir, grants him a precept (called of *clare constat*, from the first words of its recital), commanding his bailie to infest him in the subjects that belonged to his ancestor. These precepts are, no doubt, effectual against the superior who grants them and his heirs; and they may, when followed by seisin, afford a title of prescription: but as no person can be declared an heir by private authority, they cannot bar the true heir from entering after twenty years, as a legal entry would have done.<sup>(l)</sup> Of the same

Entry upon a  
precept of *clare  
constat*.

(71, 72)

(l) "A precept of *clare constat* does not require to set forth the precise character in which the heir of the last investiture claims an entry. In *Crichton's Crs. v. Christian Knowledge Society* (Jan. 16, 1798, M. 15,115), it was observed that 'a service being an *actus legitimus* must be accurate in every particular, whereas it is sufficient that the former is substantially right' (see *Ogilvy v. Ogilvy*, June 5, 1817, F. C., Hume 724). Entry by precept of *clare* does not infer general representation or liability for the debts of the ancestor; a point now fixed, contrary to *Ersk. Inst. iii. 8. 71* (*Rosebery v. Crs. of Primrose*, 1766, M. 11,166; see *Ogilvy v. Ogilvy*, *supra*); but a vassal taking an entry by precept of *clare* does not escape liability for the debts of the former heir, who had been three years in possession, the Court considering such an entry as equivalent to an entry by service (*Brown v. Henderson*, July 17, 1852, 14 D. 1041). The superior may grant his precept of *clare* in favour of any heir, whether of law or of provision, under a deed of settlement conformable to and within the terms of the standing investiture. Formerly the precept was accounted strictly personal, and fell by the death either of superior or vassal, but now (10 & 11 Vict., c. 48, § 15) it remains in force during the lifetime of the grantee, notwithstanding the death of the granter. [If, however, the grantee shall die without taking infestment, the precept falls: 31 & 32 Vict. c. 101, § 103.] A writ of *clare constat* has been introduced by the Titles to Land Act 1858 (see 31 & 32 Vict. c. 101, § 101 *et seq.*), in place of the former precept of *clare*, the granting and recording of which, with a warrant of registration in the appropriate Register of Sasines, is declared to have the same effect as if a precept of *clare constat* had been granted, and an instrument of sasine had been expedite and recorded of the

Entry by hasp and staple.

nature is the entry by hasp and staple, commonly used in burgage tenements of houses, by which the bailie, without calling an inquest, cognosces or declares a person heir upon evidence brought before himself; and, at the same time, infefts him in the subject by the symbol of the hasp and staple of the door.<sup>(m)</sup> How far charges given by creditors to apparent heirs to enter, stand in the place of an actual entry, so as to support the creditors' diligence, has been explained (ii. 12, § 5).

The service must describe the special character of the claimant.

(74, 75)

35. A service proceeding on a claim as next and lawful heir, carries all the subjects descendible to an heir-at-law that have not been limited by any entail; but it carries no right provided to a certain order of heirs, even though the claimant should, by the failure of the prior members of tailzie, happen to be also heir of provision; for he ought to have claimed as heir of provision; and the service must be restricted to the claim laid before the inquest, and the evidence brought in support of it (*Edgar v. Johnston*, July 21, 1738, M. 14,436). In all succession, therefore, by provision, in which the heir of line comes also to have right as heir of provision by the death of the prior members of entail, he ought to be described in the service by that particular character under which he claims.<sup>(n)</sup> A general service cannot include a special one; since it has no relation to any

A special service includes a general.

date of recording the writ. The superior is now bound to grant a writ of *clare constat*, on condition of payment of the duties and casualties [abolished in feus granted subsequent to Oct. 1, 1874, by 37 & 38 Vict. c. 94, § 23] due on an entry [and production of a prior charter or writ showing the *tenendas* and *reddendo* of the lands; *ib.* § 101].—MOIR. In entries with the Crown as superior in this form, a decree of general or special service must also be produced (*ib.* §§ 84, 85).

(m) An heir to burgage subjects may now complete his title by writ of *clare constat* signed by the provost, as acting magistrate, and town-clerk (31 & 32 Vict. c. 101, § 102). The heir in burgage subjects may also expedite a special service in the ordinary way (*ib.* § 27).

(n) "An exception is admitted where one character of heir necessarily implies another character, for in that case rights conceived in favour of the latter character will be carried by a service in the former (*Haldane v. Haldanes*, 1766, M. 14,443)."—MOIR. The petition for service as heir of provision must specify the deed or deeds under which the petitioner claims (31 & 32 Vict. § 29). By 37 & 38 Vict. c. 94, § 11, it is no objec-

special subject, and carries only that class of rights on which seisin has not proceeded; but a special service implies a general one of the same kind or character,<sup>(o)</sup> and consequently carries even such rights as have not been perfected by seisin; for if the verdict's returning an answer *affirmative* to the two first heads of the brief vests those rights in the heir, their answering them jointly with the other five heads of the brief must have the same effect.

A special service includes a general one of the same kind.

36. Service is not required to establish the heir's right in titles of honour, or offices of the highest dignity; for these descend *jure sanguinis*. As the bare right of apparen-  
In what cases service is not required.  
 cy entitles an heir to continue his ancestor's possession, an heir may, even without a service, not only levy the rents of a land estate, but enjoy a tack, or any other temporary right belonging to his ancestor. But though the property of the rents of the ancestor's estate is now adjudged to belong to the apparent heir (*supr.* § 25), it would seem that the right of apparen-  
(77, 73)  
 cy cannot make him proprietor of tacks,<sup>(g)</sup> or any other such heritable rights belonging to his ancestor; and consequently it may be doubted whether he can assign such tack to another, more than he can convey his ancestor's land estate; for it is the proprietor alone who has a right to assign.<sup>(r)</sup> A child who is *nominatim* substituted in a bond

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tion to any precept or writ from Chancery, or of *clare constat*, or to any decree of service, general or special, or to any writ of acknowledgment, &c., no matter of what date, that the character in which the heir was entitled to succeed is erroneously stated, provided such heir was truly entitled to succeed as heir to the lands specified.

(o) Hence it "vests the heir not only with the particular subject or subjects in which the ancestor was infeft, but also with all personal rights which descend to the heir of line. And, accordingly, it subjected the heir to all the burdens to which he would have been liable if he had served heir in general, a liability which has been restricted by the Service of Heirs Act (see 31 & 32 Vict. *l. c.*) to a limited passive representation to the value of the property carried by the service."—MOIR. See also § 26, note (x).

(g) See next note.

(r) Allodial rights require no service. Leases, even when registered (though service is required in one mode of completing a title to these; 20 & 21 Vict. c. 26, § 8), a *jus crediti* under a marriage-contract not yet

to his father, needs no service for proving that the creditor is dead; but where a bond is taken to one and the heirs of his body, whom failing to a substitute, a service must be obtained by the substitute for proving that the heirs called before him have failed (Stair, iii. 5, § 6). No right clothed with infeftment can, in any case, be transmitted to substitutes without service.<sup>(s)</sup>

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implemented or secured (Inst. § 73; *Ogilvy v. Ogilvy's Trs.*, Dec. 16, 1817, F.C.), and moveables made heritable *destinations* (Bell's Prin. 1825), are transmitted without service.

(s) "Where the conveyance is in favour of the granter himself, whom failing to another—say A B—and infeftment follows, the fee is in the granter, and must be taken up by A B by special service. Even if infeftment has not followed, the personal right of fee must be taken out of the granter by a general service carrying the unexecuted procuratory or precept (*Young's Trs. v. Young*, July 19, 1867, 5 Macph. 1101). But suppose a destination, not in favour of the granter, but of A, whom failing to B, and A survives the granter but takes no infeftment. On A's death, B, on the assumption that the feudal right remained in the granter, and that no right had passed to A, serves heir to the granter in special. This title has been found inept (*Hay v. Hay*, June 30, 1758, M. 14,369, the Linplum case). Lands were there conveyed by a father to his eldest son, John Hay, and his heirs-male by an existing or by any future marriage; whom failing, they were to revert to Sir James Hay, the granter. No infeftment followed. The institute predeceased his father without issue. The father, without making up a title to his son, being in fact under the impression that by the predecease of his son he had never been divested, re-entered to possession of the estate, and executed a settlement in favour of himself in liferent, and his surviving son, James, and a series of heirs. That settlement after his death was challenged. The ultimate decision was, 'That a general service of Sir James Hay, as heir to his son John, was necessary for properly vesting the right of the lands of Barra in Sir James, and to empower Sir James to convey these lands.' It appears difficult to reconcile this decision with the previous judgment in *Edgar v. Maxwell* (Elshieshiells case, 1736 M. 3090, 4325, 14,015, Elch. 'Service of Heirs,' 2, 'Service and Confirmation,' 6, aff. 1742, Cr. St. & P. 334, 2 Ross's L.C. 596). But there does appear to be a distinction which may or may not explain the difference in the result. In the case of *Edgar* the heir had in him a right to lands under a former investiture, and he had right to them also under a personal title. He neglected the personal right title, completed his title under the last investiture, and thereafter executed a new conveyance of the lands. It was held that the personal title was extinguished by the party neglecting it, and completing his title in terms of the former in-

37. A special service does not carry out of the *hereditas jacens* of the deceased the special subjects in which he died Service must be completed by seisin.

(78-80)

vestiture, and that the conveyance executed by him was valid. Lord Kilkerran states the import of the decision thus—'Where one has it in his power to make up his right to an estate by either of two titles, *e.g.*, upon the destination in his contract of marriage or upon the ancient investiture of the estate, and is under no restraint which of the two he shall choose: If he shall choose to make up his titles on the one, *e.g.*, upon the ancient investiture of the estate, and conveys away the estate as in this case, no subsequent heir can take up the estate on the provision in the marriage-contract, and thereupon challenge that conveyance.' Here it will be observed the party had in him both rights, the right under the old investitures and the personal right under the marriage-contract, under which he was the institute; while in the case of *Hay*, Sir James being merely a substitute could only carry the personal right by a service to his son. This appears to be the ground on which Lord Kilkerran distinguishes the two cases. He says (MS. note), with reference to *Hay*, 'The Lords altered, and most justly. The principle urged by the President for Lord Charles was just that where a man had two rights in him he might make choice of either, and no heir succeeding could take up the other right, and thereon quarrel his deed. But it did not apply, for here the two rights were not in Sir James, as he had not made up any title to the personal right which lay in *hereditate jacente* of his son.' (See 2 Ross's L.C. 568-576, 596-602.) It might be supposed that where a person disposes, not to himself, but to the heirs of his body, whom failing to another party *nominatim*, he would be held to have divested himself of the personal fee, and consequently, that on the failure of heirs the person next substituted by the disposition could carry nothing by service to the granter of the deed. But it has been decided otherwise. It is held that where the conveyance is in the first instance to heirs of the body, and then to a substitute, the fee remains in the granter, and must be taken out of him by service (*Peacock v. Glen*, June 22, 1826, 4 S. 742; *Carlton v. Gordon*, Feb. 8, 1748, M. 14,368).—MOIR. But probably, as Mr. M'Laren suggests (Wills and Succession, i. 497), this applies only in destinations to heirs *nascituris*, the predecease of other heirs, whether they are mentioned by name or designatively, causing the succession to open to the next substitute as conditional institute, on the principle, now established, that every substitution includes a conditional institution in the event of the previous members of the destination predeceasing the granter. It was settled by *Colquhoun v. Colquhoun* (Dec. 16, 1828, 7 S. 200, remitted Feb. 17, 1831, 5 W. & S. 32, July 8, 1831, 9 S. 911), and *Fogo v. Fogo* (Feb. 25, 1840, 2 D. 651, remitted June 22, 1841, 2 Rob. 440; opinions, March 11, 1842, 4 D. 1063, H.L., Aug. 18, 1843, 2 Bell's App. 195, 2 Ross's L.C. 53), that where the institute in a des-

infest, until the heir complete it by seisin.(t) Where the lands hold of the Crown, the chancery issues precepts for infesting

tionation predeceases the testator, the next heir called in the destination succeeds as an immediate disponee, and may take infestment on the precept in the settlement without expeding any service, apparently on the principle that a conditional institution is implied in all substitutions. The practice, however, in such cases appears to be to expedite an alternative title both as conditional institute and as substitute (by service as heir of provision to the predeceasing institute). The whole law on this subject was reviewed in the case of *Hutchison* (Dec. 20, 1872, 11 Macph. 229) by the First Division and three Judges of the Second—and it was held, where the granter of a *mortis causæ* settlement disposed his heritable estate “to the heirs of my own body equally among them, share and share alike, whom failing, to A, B, C, and D, equally among them, share and share alike, and their respective heirs in fee,” and died without leaving any heirs of his body, that A, B, C, and D, were conditional institutes, and not substitutes, and had right to the property as disponees, without service or declarator. “There is no room for a second special service in the same subject, the right having been fully carried by the first.

Competency of  
second service.

But it was long held that notwithstanding a prior general service it was competent for another party to expedite a second general service to the ancestor in order to establish his own character of heir, and to reduce deeds granted to his prejudice. In *Cochran v. Ramsay* (March 11, 1828, 6 S. 751, rev. April 29, 1830, 4 W. & S. 135) the Court of Session held that a second general service to the same ancestor was competent, not as carrying rights, but as a means of establishing propinquity. But this judgment of the Court of Session was reversed, and it may now be considered fixed that service, merely as a means of establishing propinquity, and where no rights can be carried by it, is incompetent and inept. But an heir-apparent may, without service, pursue a reduction of the service and infestment of a party whom he alleges to have been improperly served (*Rutherford v. Nisbet's Trs.*, Nov. 12, 1830, 9 S. 43).”—MOIR.

(t) The general service transmits the right of succession to the personal right in the subject ; so that if the party served should die without taking infestment on the precept or procuratory which has been carried to him by the service, the next heir serves to him as being in possession of the personal fee. In the case of a special service the law has been altered since Erskine's time ; and by 31 & 32 Vict. c. 101, § 46, a decree of special service recorded and extracted has the effect of a disposition from the ancestor to the heir served and vests in him a personal and transmissible right to the lands, and even though he have not completed his title, his heir or successors may complete theirs by using the extracted decree as if it were an unrecorded conveyance in favour of the heir so served to which they had acquired right.

the heir, which must be directed to the Sheriff of the shire.(u) In lands holden of a subject, the heir may, in place of the former tedious method of running precepts against the superior (Hope Min. Pr. 55), obtain a warrant from the Session for letters of horning to charge the superior to receive him (20 Geo. II. c. 50). Where the superior is not himself entered, such charge would be inept; in that case, therefore, the heir must, in terms of 1474, c. 57, charge the superior to obtain himself entered within forty days in the superiority, that so he may be in a capacity of entering his vassal, under a penalty of losing his right for life. If the superior refuse to obey either of these charges, the next superior, as coming in his place (*supplendo vices*), may be compelled at the suit of the heir to infest him; and thus the heir may proceed against all the intermediate superiors between him and the Sovereign, against whom a charge is both improper and unnecessary; for the Crown refuses none (see Dallas's Styles, p. 234). The superior thus entering, his sub-vassal's heir loses none of the casualties fallen by his immediate vassal; seeing what he does is merely an act in obedience.(v)

What if the superior shall refuse to enter the heir

38. An heir, by intermixing with his ancestor's estate without entry, subjects himself to his debts, as if he had entered; or, in our law-phrases, incurs a passive title. The only passive title by which an apparent heir becomes liable universally for all his ancestor's debts is *gestio pro hærede*, or his behaving himself so as none but an heir has right to do (1. 20, *pr.*, *de adq. vel. amit. her.*, 29, 2). Behaviour as heir is inferred from the apparent heir's intromission, after the death of the ancestor, either by himself, his tenants, or

Passive titles in heritage.

(82-84)

*Gestio pro hærede;*

from what facts inferred.

(u) The Titles to Land Act, 1858, substituted for the Chancery precept a "Crown writ of *clare constat*," which, when recorded in the Register of Sasines, has the same effect as the precept followed by sasine (31 & 32 Vict. c. 101, §§ 84, 85).

(v) Practically this procedure is superseded (see above, b. ii. t. 5. § 20; b. ii. t. 7, §§ 3, 6, and notes). In the Inst. at this place (§ 81), it is suggested that where the two rights of property and superiority meet in the same person they may be consolidated by a precept of *clare constat* by the heir, as superior, in favour of himself as vassal, followed by infestment. But this doctrine is incorrect; see above b. ii. t. 7, § 9, note (l).

factors, with any part of the lands or other heritable subjects belonging to the deceased, to which he himself might have completed an active title by entry; even with heirship-moveables,<sup>(w)</sup> which in the doctrine of succession are considered as heritage; or with the title-deeds or other writings of the deceased. It is inferred without actual intromission, by the heir's conveying to a third party, or even granting discharges of rents or other subjects to which he might have succeeded as heir, or by his consenting to the conveyance of such subjects (see *Johnston v. Johnston*, Feb. 10, 1642, M. 9692). But his bare renunciation of the succession in favour of another does not infer it; because nothing is thereby transmitted to the receiver hurtful to the creditors (*Scott v. Affleck*, July 5, 1666, M. 9693).<sup>(x)</sup>

How excluded.

(85)

39. This passive title is excluded if the heir's intromission be by order of law<sup>(y)</sup> (e.g., intromission with heirship-moveables in consequence of confirmation); or if it be founded on singular titles, and not as heir to the deceased, e.g., if he has intermeddled with the heirship as donatory from the Crown to the single escheat of the deceased, or if he has levied the rents of his ancestor's estate in virtue of an adjudication against it to which he himself had acquired a right. This last defence was always sustained, though the adjudication had proceeded on a bond granted by the heir himself, till the Lords declared (by Act S. Feb. 28, 1662) that intromission by the heir in virtue of an adjudication founded on his own bond should infer a passive title. And it is now enacted (by 1695, c. 24) that an apparent heir's purchasing any right to his ancestor's estate, otherwise than at a public roup (auction), or his possessing it in virtue of rights settled in the person of any such near relation of the ancestor, to whom he himself may succeed as heir, otherwise

A special sort introduced by statute.

(w) The right to these is abolished (31 & 32 Vict. c. 101).

(x) Neither is it incurred by a general service, under which nothing is taken (*E. Fife v. Duff*, March 7, 1828, 6 S. 698).

(y) Where the heir has intromitted with the succession, the passive title is not excluded by the fact of his having made up an inventory in order to enter *cum beneficio inventarii*, if he does not serve, but renounces (*Montgomerie v. Boswell*, Dec. 20, 1841, 4 D. 332).

than upon purchase by public sale, shall be deemed behaviour as heir.

40. Behaviour as heir is also excluded where the introduction is small, unless an intention to defraud the ancestor's creditors be presumable from the circumstances attending it (*L. Dundas v. Hamilton*, Nov. 6, 1622, M. 9658). (z) Neither is behaviour inferred against the apparent heir from the payment of his ancestor's debt, which is a voluntary act and profitable to the creditors; nor by his taking out of briefs to serve, for one may alter his purpose while it is not completed; nor by his assuming the titles of honour belonging to his ancestor, or exercising an honorary office hereditary in the family, for these are rights annexed to the blood which may be used without proper representation (*Bower v. E. Marischall*, 1682, 2 B.S. 18). But the exercising an heritable office of profit, which may pass by voluntary conveyance, and consequently is adjudgeable (ii. 12, § 3), may reasonably be thought to infer a passive title. Lastly, as passive titles have been introduced merely for the security of creditors, therefore, where questions concerning behaviour arise among the different orders of heirs, they are liable to one another no further than *in valorem* of their several intromissions (*Pride v. Thomson*, Nov. 26, 1630, M. 9861). (a)

In what other cases behaviour is excluded.

(86)

41. Another passive title in heritage may be incurred by the apparent heir's accepting a gratuitous right from the ancestor to any part of that estate to which he himself might have succeeded as heir; and it is called *præceptio hæreditatis*, because it is a taking of the succession by the heir before it opens to him by the death of his ancestor. If the right be onerous, there is no passive title; but its onerosity must be proved otherwise than by the assertion of the granter in the recital. If the consideration paid for it does not amount to its full value, the creditors of the deceased may reduce it, in so far as it is gratuitous, upon the

The passive title of *præceptio hæreditatis*.

(87, 89)

(z) *Jeffrey v. Blair*, 1789, Bell's 8vo Ca. 482.

(a) So held where the intromission was only as a trustee, in a question with a child with a provision to whom the estate was burdened, and which it was insufficient to pay (*Bruce v. Bruce*, Dec. 13, 1826, 5 S. 119).

statute 1621; but still it infers no passive title.<sup>(b)</sup> Though the right accepted of be granted to fulfil a marriage-contract it is not for that reason to be deemed onerous; for the heir of a marriage has only a right of succession, subject to the payment of the father's debts (*More v. Ferguson*, Feb. 22, 1681, M. 9781).<sup>(c)</sup>

(88, 90)

42. The heir incurring this passive title is no farther liable than if he had at the time of his acceptance entered heir to the granter, and so subjected himself to the debts that were then chargeable against him; but with the posterior debts he has nothing to do, not even with those contracted between the date of the right and the infestment taken upon it (*L. Aldy*, n.r., Feb. 1721), and he is therefore called *successor titulo lucrativo post contractum debitum*.<sup>(d)</sup> Not only immediate, but mediate apparent heirs may be subjected to preception. Thus, an eldest son of an eldest son incurs it by accepting an heritable right from his grandfather; because the acceptor is, by the necessary course of law, *alioqui successurus* to the granter, though not immediately. But a right granted by one brother to another, or by a father to his daughter,<sup>(e)</sup> does not infer it, though the succession should at last open to the grantee; because the granter might have afterwards had issue which would succeed preferably to the grantee.

In what these  
two passive  
titles agree;

(92, 91)

43. Neither of these passive titles takes place unless the subject intermeddled with or disposed be such as the intro-mitter or receiver would succeed to as heir. Hence, an heir of provision immixing with heirship-moveables, or an heir of line intermeddling with or accepting a right to subjects provided to special heirs, incurs no passive title. In this,

(b) *Lamb v. M'Donald*, 1793, Hume 428. A passive title is not inferred by acceptance of a right to moveables, because the heir is not *alioqui successurus* in moveables (Inst. l. c.).

(c) It is otherwise when a proper right of credit is given to such an heir (Inst. l. c.; see above, §§ 17, 19).

(d) It is not settled whether this passive title infers a limited or unlimited responsibility (Bell's Com. i. 660, Prin. 1918; M'Laren on Wills, &c., ii. 470).

(e) An early decision to the contrary (*Orr v. Watson*, 1634, M. 9767) is mentioned (Inst. l. c.).

also, these two passive titles agree that the intromission in both must be after the death of the ancestor; for there can be no *termini habiles* of a passive title while the ancestor is alive. But in the following respects they differ:—(1.) *Gestio pro hærede*, being a vicious passive title founded upon a quasi-delict (viz., intromission without the order of law), cannot be objected against the delinquent's heir, if process has not been litiscontested while the delinquent himself was alive (iv. 1, § 40); whereas the *successor titulo lucrativo* is, by the acceptance of the disposition, understood to have entered into a tacit contract with the granter's creditors, by which he undertakes the burden of their debts; and all actions founded on contract are transmissible against heirs; (f) (2.) The right accepted by the *successor titulo lucrativo* gives him an active title, whereby process of relief is competent to him against the executors of the ancestor for such of the moveable debts as he has paid; whereas he who behaves as heir, not being heir *active*, has, in Lord Stair's opinion, no title in strict law (though that rigour may be softened by equity, Stair iii. 6, § 19) to sue for relief, either against the executors, or any other heir who may be liable before him, unless he has taken care to get an assignation from the creditor upon payment. But this does not bar him from the benefit of discussion, which is an exception or defence, and so requires no active title.

44. An apparent heir, who is cited by the ancestor's creditor in a process for payment, if he offers any peremptory defence against the debt, incurs a passive title; for he can have no interest to object against it, but in the character of heir (*Lundy v. L. Sinclair*, Feb. 11, 1713, M. 12,064). (g) In the same manner, the heir's not renouncing upon a charge to enter heir infers it. (h) But the effect of both these is

n what they differ.

Proposing defences against the ancestor's debt,

(93)

(f) *Henderson v. Wilson*, 1717, M. 9784.

(g) A defence offered merely to exclude the pursuer's title, or which does not found on any right that was in the ancestor, infers no passive title (Inst. l. c.). And as a defender is now bound to state all his defences at once, no passive representation is incurred by pleading alternately that he does not represent the debtor, and that no debt is due (*Smith v. Drummond*, June 25, 1829, 7 S. 792).

(h) *Richan v. Hill*, Dec. 22, 1832, 11 S. 237.

and not renouncing upon a charge to enter, are passive titles ;

and entering to a more remote predecessor.

(94)

limited to the special debt pursued for, or charged upon; for the deeds from which such representation is inferred being private, can operate only in favour of the special creditor at whose suit the process or charge is raised. This passive title, which is inferred from the heir's not renouncing, has no effect till decree pass against him; and even a renunciation offered after decree, if the decree be in absence, will entitle the heir to a suspension of all diligence against his person and estate, competent upon his ancestor's debts.(i)

45. By the principles of the feudal law an heir, when he is to complete his titles by special service, must necessarily pass over his immediate ancestor—*e.g.*, his father—if he was not infeft, and serve heir to that ancestor who was last vest and seised in the right, and in whose *hæreditas jacens* the right must remain till a title be connected thereto from him. As this bore hard upon creditors who might think themselves secure in contracting with a person whom they saw for some time in the possession of an estate, and from thence conclude that it was legally vested in him, it is therefore provided (by 1695, c. 24) that every person passing over his immediate ancestor who had been three years in possession, and serving heir or succeeding by adjudication on his own bond to one more remote, shall be liable for the debts and deeds of the person interjected to the value of the estate to which he is served. This statute being correctory of the feudal maxims, has been strictly interpreted, so as not to extend to the gratuitous deeds of the persons interjected (*M. Clydesdale v. E. Dundonald*, 1726, M. 1274); (k) nor to

(i) But renunciation will not avail him after having behaved as heir, or incurred other passive title (Inst. l. c.; *Montgomerie v. Boswell*, Dec. 20, 1841, 4 D. 332).

(k) But in this matter a deed granted in implement of a natural obligation is onerous (Bell's Pr. 1930), as a provision by a marriage-contract (Inst. l. c.), or reasonable provisions to wives or younger children (*Russell v. Russell*, Dec. 7, 1852, 15 D. 192). "If the estate possessed for the three years by the apparent heir was held under a completed entail prohibiting all burdens or alienations, there is of course no room for the application of the statute, because such debts, even if contracted by the heir himself served and infeft, would not have been good against the estate; and where the entail has been recorded during the apparenacy, this also excludes the

the case where the interjected person was a naked fiar, and possessed only civilly through the liferenter (*Bogle & Gordon v. M'Caul*, June 25, 1745, M. 9748).<sup>(l)</sup> If an heir, in place of completing his titles by adjudging upon his own bond, or by entering to his remote predecessor, which are the only cases expressly guarded against by the statute, shall possess the lands in the bare right of apparenancy, it has been found, once and again, that the penalty of the act does not reach him (*Sinclair v. Sinclair*, Jan. 8, 1736, M. 9810; *Grant v. Sutherland*, 1754, M. 9819); but this point is still called in question, perhaps not without some reason, for if such a device, which is in the power of every heir, shall effectually secure against a passive title, the intention of the statute may be utterly defeated.<sup>(m)</sup>

46. Our law, from its jealousy of the weakness of mankind while under sickness, and of the importunity of friends in that conjuncture, has declared that all deeds affecting heritage, if they be granted by a person on deathbed (*i.e.*, after contracting that sickness which ends in death), to the damage of the heir, are ineffectual (R. M., l. 2, c. 16, § 7 *et seq.*), except where the debts of the granter have laid him under a necessity to alien his lands (St. Gul., c. 13, § 2). As this law of deathbed is founded solely on the privilege of the heir, deathbed deeds, when consented to by the heir, are not reducible (R. M., l. 2, c. 18, § 16). The term properly opposed to deathbed is *liege poustie*, by which is understood

Reduction by  
the heir *ex  
capite lecti*.

(95)

debts of the apparent heir from being made subsequently to affect the succeeding heir (*Graham v. Graham's Crs.*, May 17, 1795, M. 15,439).—MOIR.

(l) Unless where the liferenter's possession proceeds from the fiar (Bell's Pr. 1930). It extends to ordinary cases of civil possession (*Porterfield v. Corbet*, June 20, 1839, 1 D. 1038, July 11, 1842, 1 Bell's App. 476); not to possession by a trustee for creditors, or in a sequestration (*Buchan v. McDonald*, 1796, M. 9822, Hume 432; *Donald v. Colquhoun*, Feb. 27, 1835, 13 S. 574). The statement in the Inst. l. c., that the heir passing by and subjected by the Act to a passive title has the benefit of discussion, means that he has the same right of discussion as if he had served to the heir passed by (see above, § 24), not that he incurs under the statute merely a subsidiary liability (*Morris v. Beveridge*, Nov. 28, 1867, 6 Macph. 60).

(m) The point must be held as fixed, the case cited having been affirmed (1755, Cr. St. & Pat. 605; Bell's Com. i. 666, Prin. 1930).

a state of health; and it gets that name because persons in health have the *legitima potestas*, or lawful power of disposing of their property at pleasure.

What constitutes a death-bed deed.

(96)

Deathbed excluded by re-convalescence; or by living sixty days after the date.

47. The two extremes being proved—of the granter's sickness immediately before signing, and of his death following it, though at the greatest distance of time—did, by our former law, found a presumption that the deed was granted *in lecto* (Stair, iii. 4, § 28), which could not have been elided but by a positive proof of the granter's convalescence; but now the allegation of deathbed is also excluded by his having lived sixty days after signing the deeds (1696, c. 4). The legal evidence of convalescence is the granter's having been, after the date of the deed, at kirk or market unsupported; for a proof of either will secure the deed from challenge (*Cred. of Balmerino v. Lady Couper*, June 28, 1671, M. 3292). The going to kirk or market must be performed when people are met together in the church, or church-yard, for any public meeting, civil or ecclesiastical, or in the market-place at the time of public market (Act S., Feb. 29, 1692). No other proof of convalescence is receivable; because at kirk and market there are always present unsuspected witnesses, which we can hardly be sure of in any other case.(n)

To what heirs is this reduction competent.

(99, 100)

48. The privilege of setting aside deeds *ex capite lecti* is competent to all heirs, not to heirs of line only, but of conquest, tailzie, or provision;(o) not only to the immediate, but to remoter heirs, as soon as the succession opens to them, though the deed in dispute should not appear hurtful to the immediate heir of the granter (*Kennedy v. Arbuthnot*, 1722, M. 1681). But where it is consented to, or ratified by the immediate heir, it is secured against all challenge even from

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(n) "Equivalents to going to kirk or market, though indicating greater strength than would be necessary for going to kirk or market, are not admitted (Bell's Prin. 1794)."—MOIR. The law was altered by 34 & 35 Viet. c. 81, which enacts "that no deed, instrument, or writing, made by any person who shall die after the passing of this Act, shall be liable to challenge or reduction *ex capite lecti*;" but it has been thought right to retain in the present edition most of the former notes showing how the law of deathbed was applied.

(o) *Pattison v. Dunn's Trs.*, March 9, 1866, 4 Macph. 556, aff. July 23, 1868, 6 Macph. H.L. 147.

the remoter; for such consent has the effect of a  *fictio brevis manus* ; the dying person is considered as disposing to the heir, and he to the stranger in whose favour the deed was really granted : (p) yet the immediate heir cannot by any antecedent writing renounce his right of reduction, and thereby give strength to deeds that may be afterwards granted  *in lecto*  to his hurt; for no private renunciation can authorise a person to act contrary to public law; and such renunciation is presumed to be extorted through the fear of exheredation ( *Inglis v. Inglis* , Dec. 4, 1733, M. 3327). If the heir should not use this privilege of reduction, his creditor may, by adjudication, transfer it to himself (ii. 12, § 3); or he may, without adjudication, reduce the deed, libelling upon his interest as creditor to the heir. But the granter's creditors, though their case is more favourable than that of the heir, have no right to this privilege, in regard that the law of deathbed was introduced, not in behalf of the granter himself, but of his heir ( *Lindsay's Crs. Comp.* , 1714, M. 3204). (q) He who is entered by precept of  *clare constat* , or by hasp and staple, has an active title as heir; and, consequently, may reduce alienations  *in lecto*  of the special subjects to which he is entered.

49. The law of deathbed strikes against dispositions of every subject to which the heir would have succeeded, or from which he would have had any benefit, had it not been so disposed. Hence the alienation, even of moveables, may be set aside where the heir has an interest; as—(1.) of heirship moveables; (2.) of conquest provided to the heir of a marriage, though the subject of it should be moveable

What rights  
may be thus  
set aside, even  
moveable  
rights;

(99, 98)

(p) The consent or ratification by the heir must not be given when he is himself on deathbed ( *Leith's Trs. v. Leith* , June 6, 1848, 10 D. 1137); or when he is insolvent, and the ratification is gratuitous, or within sixty days of bankruptcy (Bell's Com. i. 98, Prin. 1816). The acceptance by the heir of a conveyance  *in liege poustie* , containing a reserved power to the granter to burden, excludes the heir's power to reduce  *ex capite lecti* , if the power be exercised ( *Pringle v. Pringle* , 1765, M. 3287, 5 B. S. 444, rev. 1767, 2 Pat 130;  *Miller v. Marsh* , July 8, 1853, 15 D. 823, aff. May 22, 1855, 2 Macq. 284).

(q) The remedy of the creditors is reduction under the Act 1621, c. 18 (Inst. l. c.; Bell's Com. i. 98).

(*Maxwell v. Neilson*, 1722, M. 3194); (3.) an heir may reduce the assignation of a moveable subject granted by his ancestor where the moveable estate of the deceased is not sufficient for his moveable debts, that so the moveable estate may be enlarged, and the heritage saved from the diligence of personal creditors (*Cowie v. Brown, &c.*, July 22, 1707, M. 3220). Deathbed deeds granted in consequence of a full or proper obligation in *liege poustie* are not subject to reduction; but where the antecedent obligation is merely natural, they are reducible (*Fowlis v. Fowlis*, 1721, M. 3223). By stronger reason, the deceased cannot by a deed merely voluntary alter the nature of his estate on deathbed to the prejudice of his heir, so as from heritable to make it moveable; but if he should in *liege poustie* exclude his apparent heir by an irrevocable deed containing reserved faculties, the heir cannot be heard to quarrel the exercise of these faculties on deathbed, since he loses the character of heir by the irrevocable deed divesting the disponent, and so has no interest to reduce any posterior deed.(r)

but not deeds granted in consequence of a prior obligation.

Competition between the creditors of the deceased and of the heir.

(101, 102)

#### 50. The proper method for affecting the heritable estate

(r) A deed executed in virtue of a power or faculty conferred is not reducible *ex capite lecti* by the persons next entitled to take failing the exercise of the power (*Morris v. Tennant*, June 7, 1853, 15 D. 716). The rule stated above does not apply if the deathbed deed contains an express revocation of the former deed, and a new conveyance of the lands. In that case the heir's right revives by the revocation so as to entitle him to challenge the new conveyance. But a revocation merely implied from the incompatibility of the deathbed deed with the earlier one has not this effect; nor has one which is only provisional—i.e., to take effect if the new deed shall stand (*Duke of Roxburghe v. Wauchope*, Dec. 13, 1816, F.C., aff. 6 Pat. 548, 2 Bligh. 630; *Coutts v. Crawford*, 1796, Bell's Ca. 207, 2 Bligh. 655; *Stewart v. Neilson*, Feb. 3, 1860, 22 D. 646). A trust-deed executed in *liege poustie*, having the effect of giving the estates to others, bars the heir's challenge of a subsequent testamentary deed altering the destination or directions to trustees; but as a mere trust-deed, reserving power of declaring the purposes by a subsequent writing does not exclude the heir, it will not save such a declaration of purposes from reduction on the head of deathbed (*Ker v. Wauchope*, 1806, 5 Pat. 559; *Erskine v. Erskine's Trs.*, Dec. 3, 1850, 13 D. 223; *Ker v. Ker's Trs.*, Feb. 24, 1829, 7 S. 454, March 10, 1830, 8 S. 694, aff. Oct. 1, 1831, 5 W. & S. 718; *Pattison v. Dunn's Trs.*, March 9, 1866, 4 Macph. 556, aff. July 23, 1868, 6 Macph. H.L. 147).

of a person deceased, either for his own debt or for that of his heir, has been explained (ii. 12, § 5). In a competition between the creditors of the deceased and of the heir, the Roman law (l. 1, § 1, *de separ.*, 42, 6), and after their example ours (1661, c. 24), has justly preferred the creditors of the deceased, as every man's estate ought to be liable, in the first place, for his own debts. But this preference is, by the statute, limited to the case where the creditors of the deceased have used diligence(s) against their debtor's estate within three years from his death; and therefore the heir's(t) creditors may, after that period, affect it for their own payment. By a subsequent branch of this Act, all dispositions by an heir of the ancestor's estate, within a year after his death, are null, in so far as they are hurtful to the creditors of the ancestor. This takes place though these creditors should have used no diligence (*Taylor v. L. Braco*, 1747, M. 3128); and even where the dispositions are granted after the year, they seem, by the first part of the Act, to be ineffectual against the creditors of the deceased who have used diligence within the three years.(u) This Act appears from its whole tenor to relate only to heritage (*Ker v. Scott*, June 17, 1712, M. 690); and so is improperly made by Mr.

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(s) The diligence must be complete, *e.g.*, adjudication must be followed by infertment within the three years, and inhibition is not complete diligence (*Menzies v. Murdoch*, Dec. 14, 1849, 4 D. 257). The creditor does not lose his preference by delays not due to his fault; and, in an action of constitution, he will get decree in order to save his preference, reserving all objections, *contra executionem*, without abiding the ordinary forms of process (Bell's Com. i. 732). In a sequestration of the heir's estate—at least where the ancestor's estate is specially adjudged or conveyed in confirming the trustee—the ancestor's creditors are entitled to the full privilege of the ancestor, without doing separate diligence, provided that they lodge their claims within the three years (*M'Lachlan v. Bennet*, June 15, 1826, 4 S. 717, aff. 3 W. & S. 449; 19 & 20 Vict. c. 79, § 102).

(t) The Act says "apparent heir," but does not restrict the remedy to the case where the heir is in apparenecy (Bell's Com. i. 730).

(u) *Arniston v. Ballenden*, 1686, 2 B. S. 93. Though a conveyance in favour of the ancestor's creditors is good, yet one in favour of a single creditor of the ancestor's is liable to be challenged by the others (*Christie v. Royal Bank*, May 17, 1839, 1 D. 745, H.L. 1 Rob. App. 118; *Torrance or Beattie v. Murdoch*, Feb. 23, 1842, 4 D. 779).

Forbes the ground of a decision concerning moveables (*Graham v. Macqueen*, Feb. 9, 1711, M. 3128, especially after the Act 1695, c. 41; see Bankt. iii. 35, § 3).

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TIT. IX.—OF SUCCESSION IN MOVEABLES.

Rules of move-  
able succession  
by law.

(2, 3)

1. In the succession of moveable rights it is an universal rule that the next in degree to the deceased (or next of kin) succeeds to the whole; and if there are two or more equally near, all of them succeed by equal parts, without that prerogative which takes place in heritage of the eldest son over the younger, or males over females. Neither does the right of representation (explained, iii. 8, § 4) obtain in the succession of moveables, except in the single case of a competition between the full blood and the half blood; for a niece by the full blood will be preferred before a brother by the half blood, though she is by one degree more remote from the deceased than her uncle.(a) Where the estate of a person deceased

Intestate Suc-  
cession Act,  
1853.

(a) Representation in moveables was introduced by the Intestate Succession Act, 18 & 19 Vict. c. 23, so that the issue of predeceasing children come in place of the parents predeceasing, and have right to the share of the succession to which they would have been entitled if they had survived. But no representation is admitted among collaterals after brothers' and sisters' descendants, so that the issue of predeceasing cousins-german are excluded (*Ormiston v. Broad*, Nov. 11, 1862, 1 Macph. 10). "Other important changes in the Law of intestate Succession have been introduced by this Act. Formerly, if a son predeceased his father and died without issue, his moveable estate went entirely to his brothers and sisters, but by § 3 his surviving father has right to one-half of his moveable estate. By § 4, if an intestate die without issue, his father having predeceased him, and he is survived by his mother, she takes one-third of his moveable estate in preference to brothers and sisters. § 5 provides that where an intestate shall die without issue, leaving neither father nor mother nor any brother or sister consanguinean, nor any descendant of such, but shall leave a brother or sister uterine, or any descendant of them (who were formerly entirely excluded), these brothers and sisters uterine, and their descendants, are to have right, in place of their predeceasing parent, to one-half of his moveable estate. Besides its direct bearing on the distribution of intestate succession, the Intestacy Act operates indirectly on questions of testate succession. Thus, in

consists partly of heritage and partly of moveables, the heir in heritage has no share of the moveables if there are others as near in degree to the deceased as himself. But where the heir in such case finds it his interest to renounce his exclusive claim to the heritage, and betake himself to his right as one of the next of kin,<sup>(b)</sup> he may *collate* or *communicate the* Collation by the heir.

*Nimmo v. Murray's Trs.*, June 3, 1864, 2 Macph. 1144, a testator destined his moveable property to his 'nearest heirs and successors.' He survived the passing of the Intestacy Act, which came into operation on 25th May, 1855. The question then arose, who were the 'nearest heirs and successors'? The next of kin pleaded that, as this was a case of testate succession, the Intestacy Act could have no application, and could not be admitted to construe the terms used in the testate deed. It was held that 'nearest heirs and successors' meant nearest heirs and successors as the law stood at the testator's death, which was held in law to be the date of his settlement. But suppose a party makes a similar bequest, and dies long prior to the date of the Intestacy Act. It may fairly be contended that he contemplated only those heirs and successors who would have taken *ab intestato*, according to the law as it stood at his own death, and not those who only became heirs and successors in consequence of a statute afterwards passed; and it was so held in *Cockburn's Trs. v. Dundas*, June 10, 1864, 2 Macph. 1186. The Court, with the exception of Lord Neaves, held that the terms used, which were 'my own nearest heirs and executors,' must be construed to mean those who could have possessed that character at the date of the baron's death; and consequently that grandchildren were excluded. Lord Neaves dissented, and held 'that the Intestate Succession Act should receive effect, and it is to be imported into every will by which the testator leaves his succession to heirs and successors. The law to be applied is the law at the time the succession opens.' Though these opinions were expressed, they were really not necessary for the decision of the case, nor have they been regarded as settling the point."—MOIR. See *Maxwell v. Maxwell*, Dec. 24, 1864, 3 Macph. 318, where the principle is adopted that a person making a destination to a person and his heirs has in view no *persona predilecta*, but plainly intends the persons, whoever they might be, who should by law have right to the succession of the person named as liferenter or institute, also to have right to the subject of the bequest. The case of *Cockburn* is, however, there treated as special (see Ersk. Inst. iii. 9, 6, *ad fin.*).

(b) It is only as one of the next of kin that the heir is entitled at common law to collate; and the contrary statement in the Inst. l. c. is erroneous (*M'Caw v. M'Caw*, 1787, M. 2383). But by 18 & 19 Vict. c. 23, an heir-at-law, entitled to succeed by representation, may collate to the effect of receiving for himself and the other issue of a predeceasing

*heritage* with the others, who, in their turn, must collate the moveables with him, so that the whole is thrown into one mass, and divided equally among all of them. This doctrine holds not only in the line of descendants, but of collaterals (*Chancellor v. Chancellor*, 1742, M. 3279, Elch. "Succession," 8); for it was introduced that the heir might in no case fare worse than the other next of kin.(c)

Succession in  
moveables by  
destination.

(5, 26)

2. One may settle his moveable estate upon whom he pleases, excluding the legal successor, by a testament;(d) which is a written declaration of what a person wills to be

next of kin the share of moveable estate of the intestate which such predeceaser, if he had survived the intestate, would have taken upon collation. Daughters of the predeceaser, being heirs-portioners, may collate to the same effect, contrary to the former rule. And if in such a case the heir does not collate, the other issue of a predeceasing next of kin have right to a share of the moveable equal to the excess in value over the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent would have taken on collation.

(c) An heir of provision is bound to collate what he takes in that character only if he be *alioqui successurus*; and an heir of entail in this position must, if he claims a share of the moveable succession, collate the value of his life interest in the entailed estate (*Gilmour v. Gilmour*, Dec. 13, 1809, F.C.; *Anstruther v. Anstruther*, Nov. 28, 1833, 12 S. 140; remitted, April 15, 1835, 1 S. & M'L. 463; adhered to, Jan. 20, 1836, 14 S. 272, aff. Aug. 16, 1836, 2 S. & M'L. 369); see *Fisher's Trs. v. Fisher*, Dec. 5, 1850, 13 D. 245, where the rule was established that the heir effectually collates by paying over into the common fund the value of the heritage as at the date of the opening of the succession, and that he is not bound to convey the heritage itself.

Succession in  
moveables  
regulated by  
domicile.

"The descent of moveable property is determined by the domicile, that is to say, not the temporary but the permanent domicile of the deceased. The moveable estate may be situated in various countries, and it may be necessary in each to go through the form of completing the title and uplifting the estate according to the rules of the country where the effects are; but the right of succession itself, the parties who are to take, and the proportions in which they are to take, the limitations on the deceased's right of testing, the rights given by law to widow and children, all depend on the permanent and *bona fide* domicile of the deceased. He may have residences in other countries, but he can have only one domicile of succession (Ersk. Inst. iii. 9, 4; *Bruce v. Bruce*, 1788, M. 4617, aff. 1790, 3 Pat. 163; *Hog v. Lashley*, 1791, M. 4619-8193, aff. 3 Pat. 247)." — MOIR.

(d) And now also heritable estate (31 & 32 Vict. c. 101, § 20).

done with his moveable estate after his death.(e) No testa- Testament.  
mentary deed is effectual till the death of the testator, who  
may therefore revoke it at pleasure, or make a new one, by  
which the first loses its force; and hence testaments are  
called last or latter wills.(f) Testaments, in their strict Executors.  
acceptation, must contain a nomination of executors, *i.e.*, of  
persons appointed to administer the succession according to  
the will of the deceased.(g) Yet nothing hinders one from  
making a settlement of moveables in favour of a universal  
legatee, though he should not have appointed executors;  
and, on the other part, a testament, where executors are  
appointed, is valid though the person who is to have the

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(e) "It may be made in the last moments of life, and under the  
heaviest sickness or bodily distress, provided the maker be *sane mentis*,  
of sound judgment when he signs it" (Inst. l. c.).

(f) "It is presumed in law to be executed as at the time of death, at  
whatever time it may have been actually signed (*Hyslop v. Maxwell*,  
Feb. 12, 1834, 12 S. 413; *Nimmo v. Murray's Trs.*, June 3, 1864, 2 Macph.  
1144). If a series of wills be executed, each as a complete testament, the  
last only in date is effectual. A power of revocation is implied in  
all wills, and so a clause in a will declaring it to be irrevocable will not  
make it so, even where it bears to be granted for past services, and has  
actually been delivered to the grantee. See cases in note to Ivory's  
Erskine, vol. ii. 875. Where the latest of several testaments which had  
revoked all prior ones is itself afterwards cancelled by the testator, the  
prior testaments revive (*Howden v. Crichton*, July 8, 1815, F.C.; *Dove*  
*v. Smith*, May 31, 1827, 5 S. 734; see *Ker v. Erskine*, Jan. 16, 1851, 13  
D. 492)."—MOIR.

(g) "It is not necessary that an executor be named in the will, he  
being truly only a trustee to hold and distribute the executry-funds  
(*Kemp v. Ferguson*, 1802, M. 16,949). In *Robertson v. Ogilvy's Trs.*,  
Dec. 20, 1844, 7 D. 236, where the names of various trustees were erased  
or vitiated, Lord Fullarton expressed an opinion that a settlement might  
stand good though the names of all the trustees had been erased. The  
trust is nothing but the machinery for carrying the granter's intentions  
into effect, and so far from being essential to the support of the bene-  
ficial interests, these interests are protected, and means taken for carry-  
ing the party's intention into effect after the whole apparatus contrived  
by him for that effect has irrevocably fallen to the ground. If, however,  
there were reason for thinking that the truster erased or obliterated the  
names of the trustees for the purpose of cancelling the disposition itself,  
the result would be different (see Lord Ivory in *Royal Infirmary v. Lord*  
*Advocate*, June 28, 1861, 23 D. 1221, 1222)."—MOIR.

A stranger named executor is accountable to the next of kin.

Nuncupative testament.

(7)

right of succession should not be named. In this last case, if the executor nominated be a stranger, *i.e.*, one who has no legal interest in the moveable estate, he is merely a trustee accountable to the next of kin; but he may retain a third of the dead's part (explained, § 6) for his trouble in executing the testament; in payment of which, legacies, if any be left to him, must be imputed (1617, c. 14).<sup>(h)</sup> The heir, if he be named executor, has right to the third as a stranger, but if one be named who has an interest in the legal succession, he has no allowance, unless such interest be less than a third. Nuncupative or verbal testaments are not, by the law of Scotland, effectual for supporting the nomination of an executor, let the subject of the succession be ever so small.<sup>(i)</sup> But verbal legacies not exceeding £100 Scots are sustained; and even where they are granted for more they are ineffectual only as to the excess (*Wallace v. Muir*, July 9, 1629, M. 1350).<sup>(k)</sup>

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<sup>(h)</sup> *Grant v. Murray*, Nov. 28, 1849, 12 D. 201. This is altered by 18 Vict. c. 23, § 8, and the executor now gets nothing in that character, but holds the undisposed of surplus for the benefit of the next of kin, unless he is himself named universal legatee (*Oliphant v. Oliphant*, 1636, M. 3923).

<sup>(i)</sup> "The will must be in writing; it must be completed and subscribed, mere directions to make a will being of no effect (see the case of *Monro v. Coutts*, July 3, 1813, 1 Dow 437). But see *Scott v. Scales*, Feb. 5, 1864, 2 Macph. 613; *Lowson v. Ford*, March 20, 1866, 4 Macph. 631. A holograph will is effectual; but not an improbate writing, except where the improbate writing is referred to, and, as it were, imported into a probative deed (see b. iii. 2, 9, and notes). It was a common opinion, probably founded on a passage in Ersk. Inst. iii. 2, 23, that some peculiar favour was to be given to testamentary writings, though not quite formal, especially if executed where men of business were not to be had. But the cases which he cites being those of holograph writings, which themselves constitute an undoubted exception, do not bear out the doctrine. And in *Rankine v. Reid*, Feb. 7, 1849, 11 D. 543, where an attempt was made to support a codicil which was neither holograph nor tested, on the ground of the favour to be shown to testamentary writings, the plea was disregarded, and effect was denied to the codicil."—MOIR.

<sup>(k)</sup> But a *donatio mortis causâ* to a larger amount may be made by delivery *inter vivos* (see b. iii. t. 3, § 37, and there note c). And a verbal direction to an executor and residuary legatee, proved by writ or

3. A legacy is a donation by the deceased, to be paid by the executor to the legatee. It may be granted either in the testament or in a separate writing. Legacies are not due till the grantor's death; and consequently, they can transmit no right to the executors of the legatee in the event that the grantor survives him.<sup>(l)</sup> By the Roman law, if one be- Legacy,  
not due till  
the grantor's  
death.  
(6, 9)

oath, is sustained as a trust (Inst. l. c.; *Hannah v. Guthrie*, 1738, M. 3837, 5 B. S. 203, Elch. "Legacy," 5).

(l) Unless the legacy be devised to the legatee and his executors, when the executors take as conditional institutes (Inst. § 9, *cit.*). As to the rule in the text, see *Graham v. Hope*, 1807, M. App. "Legacy," 3; *Gordon v. Milne's Trs.*, Feb. 3, 1859, 21 D. 377. "Where a legacy is given to one in liferent and another in fee, the existence of the liferent does not suspend the vesting of the fee. The right of each vests at the death of the testator. Nor is the case different when the deed giving the legacy is a trust-deed directing the trustees to give a liferent to one person and the fee to another. Legacies are pure or contingent. A provision payable on an event which may or may not happen, such as the legatee attaining majority or being married, is contingent, and there can be no vesting until the event occurs; while a provision payable on the expiry of a liferent is not contingent, because the period of payment, though it cannot be ascertained beforehand, must arrive (*Fowke v. Duncan*, 1770, M. 8092; *Wallace v. Wallaces*, 1807, M. App. "Clause," 6). It has been questioned whether vesting would be held to take place as at the testator's death if the bequest were not in favour of an individual *nominatim*, but in favour of a class of persons. But in *Forbes v. Luckie*, Jan. 26, 1838, 16 S. 374, where the direction was, after the death of the testator's daughter, to whom he gave the liferent, to pay the residue to the *whole children of her body*, share and share alike, it was held that 'the fee of the residue was not prevented from vesting in these children by the circumstance that the bequest of residue was conceived in favour of a class of persons, and not in favour of certain individuals *nominatim*' (see *Matthew v. Scott*, Feb. 21, 1844, 6 D. 718). Nor does it make any difference whether the liferent be given to one or to several (*Calder v. Dickson*, June 4, 1842, 4 D. 1365); or to several persons, and the survivor of them (*Maxwell v. Wylie*, May 25, 1837, 15 S. & D. 1005). In the cases referred to, the legacy was simply given to an individual *nominatim*, or to a class, on the death of a liferenter, with no ulterior destination. But vesting will be suspended till the period of distribution where there is a destination or destinations over to other parties than the legatee first named. If a legacy were given to A B, adding the words *in the event of his surviving the liferentrix*, there could be no doubt that no right to the legacy would vest in him in the event of his predecease. But this direct and express declaration of intention

*Legatum rei alienæ.*

(10)

Legacy of an heritable bond.

queathed a subject knowing that it was not his own, the heir must either have purchased it for the legatee or paid him the value; for otherwise the legacy could have no effect. Where the testator *rei alienæ* believed the subject to belong to himself, which is *in dubio* to be presumed, neither the thing nor its value could be claimed; because it was not to be supposed he would have burdened his heir if he had known that the subject had belonged to another (§ 4, *Inst. de legat.*, 2, 20). These rules hold also by the usage of Scotland (*Murray v. Rutherford's Exrs.*, June 16, 1664, M. 13,300; *Falconer v. Dougal*, June 24, 1664, M. 13,301); and they are justly extended even to legacies of subjects which truly belonged to the testator, but which are not transmissible by testament. Thus, the legacy of an heritable bond due to the testator himself, which he could not but know was heritable, and consequently not divisible by testament,<sup>(m)</sup> falls by our practice under the rule of legacies *rei alienæ scienter legatæ* (*Cranston v. Brown*, Dec 2, 1674, M. 8059; *Paterson v. Spreuls*, July 19, 1745, M. 3333); because the reason of the rule is equally applicable to both. There is this separate ground why the

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is not usual in testaments and trust-deeds; and the form in which an interest in a legacy is rendered contingent on the fiar's survivance of the period of distribution is by adding to the destination in favour of the legatee a destination to another party, which is to take effect in the event of the institute's not surviving the period of payment, or in the case of legacies to a plurality of persons, by taking the destination to these parties and the survivor of them (*Moubray v. Scougall*, July 9, 1834, 12 S. 911; *Newton v. Thomson*, Jan. 27, 1849, 6 D. 78; *Richardson v. Cope*, March 8, 1850, 12 D. 805; *Walker v. Park*, Jan. 20, 1859, 21 D. 286; *Richardson v. Donaldson's Trs.*, July 20, 1860, 22 D. 1527, rev. Feb. 14, 1862, 4 Macq. 314). But if, after the expiry of a liferent, the legacy is to be paid simply to a party, *his heirs, and assignees*, this is not regarded as a destination over, but as words introduced simply to prevent the legacy from lapsing in the event of the legatee predeceasing the testator; and instead of being regarded as a proof of intention to suspend the vesting, it is considered as affording a strong presumption that vesting *a morte testatoris* was intended (*Marchbanks v. Brockie*, Feb. 18, 1836, 14 S. 521; *Cochrane v. Cochrane's Exrs.*, Nov. 29, 1854, 17 D. 103).—  
MOIR.

(m) This is no longer the case (31 & 32 Vict. c. 101, § 20).

legacy of an heritable bond left in a testament in which the testator's heir is named executor and universal legatary cannot be questioned by the executor, viz., that he ought not to take the benefit of the testament as executor, and at the same time, in the character of heir, decline making payment to the legatee of the special heritable bond bequeathed to him by that testament. Where a moveable bond is bequeathed, for which the testator has afterwards taken an heritable security, his altering the nature of the subject imports a revocation of the legacy (*Edmonston v. Primrose*, July 8, 1673, M. 13,304).

4. Legacies, where they are general, *i.e.*, of a certain sum of money indefinitely, give the legatee no right in any one debt or subject; he can only insist in a personal action against the executor for payment out of the testator's effects.

General legacy.  
(11, 12)

A special legacy, *i.e.*, of a particular debt due to the deceased, or of a particular subject belonging to him, is of the nature of an assignation, by which the property of the special debt or subject vests, upon the testator's death, in the legatee, who can therefore directly sue the debtor or possessor; yet as no legacy can be claimed till the debts are paid, the executor must be cited in such process, that it may be known whether there are free effects sufficient for answering the legacy. Where there is not enough for payment of all the legacies, each of the general legatees must suffer a proportional abatement. But a special legatee gets his legacy entire, though there should be nothing over for payment of the rest; and, on the contrary, he has no claim if the debt or subject bequeathed should perish, whatever the extent of the free executry may be.

Special legacy  
confers a *jus*  
*in re*;

and is not sub-  
ject to abate-  
ment from  
deficiencies.

5. Minors after puberty can test without their curators; wives without their husbands; and persons interdicted without their interdictors; but bastards cannot test except in the cases afterwards set forth (iii. 10. 3). As a certain share of the goods falling under the communion that is consequent on marriage, belongs, upon the husband's decease, to his widow, *jure relicte*, and a certain share to the children, called the legitim, portion natural, or bairn's part of gear, one who has a wife or children, though he be the absolute

Who can test?  
(15, 16)

One cannot alien *in lecto*, or test in prejudice of the relict or the legitim.

administrator of all these goods during his life, and consequently may alien them by a deed *inter vivos* in *liege poustie*, even gratuitously if no fraudulent intention to disappoint the wife or children shall appear (i. 6, § 7), yet cannot impair their shares gratuitously on deathbed (see Dirl. Doubts, voce "*Legitima Liberorum*"); nor can he dispose of his moveables to their prejudice by testament, though it should be made in *liege poustie*; since testaments do not operate till the death of the testator, at which period the division of the goods in communion have their full effect in favour of the widow and children.

Division of a testament in case of a widow or children;

(18, 19, 21)

6. If a person deceased leaves a widow but no child, his testament, or, in other words, the goods in communion, divide in two; one-half goes to the widow, the other is the dead's part (*i.e.*, the absolute property of the deceased), on which he can test, and which falls to his next of kin if he dies intestate. Where he leaves children, one or more, but no widow, the children get one-half as their legitim; the other half is the dead's part, which falls also to the children if the father has not tested upon it.(n) If he leaves both

Discharge of *jus relictæ*.

(n) The division is also bipartite if the wife has renounced her *jus relictæ* during her husband's life. "The *jus relictæ* in the general case is not barred by the acceptance of a special provision, except that be given expressly as in lieu and full of the legal right (*Howden v. Orichton*, May 18, 1821, 1 S. 18; *McLaren on Wills and Succ.*, i. 135). But even without an express declaration that the provision shall be accepted as in lieu of *jus relictæ*, a widow's claim may be barred; as where she accepts a general liferent of the whole estate of the husband, heritable and moveable (*Riddell v. Dalton*, 1781, M. 6457). In *Thomson v. Smith* (Dec. 8, 1849, 12 D. 282), Lord Moncreiff appeared to consider the point as still debateable; but as a liferent provision of the whole estate must include a liferent of what otherwise would have been *jus relictæ*, it would seem that the widow could not disappoint this general settlement by taking the liferent provision and at the same time claiming a portion of the fund which produced the liferent. If the husband executes a total settlement of his estate, and gives a provision to the widow, she cannot, any more than the children, disturb the general conveyance by claiming her legal provision while she at the same time demands the conventional provision in her favour. All discharges granted by a wife will be rigorously construed (see *Keith v. Keith's Trs.*, July 17, 1857, 19 D. 1040).—MOIR. The acceptance after the dissolution of the marriage

widow and children, the division is tripartite; the wife takes one-third by herself; another falls as legitim to the children, equally among them, or even to an only child, though he should succeed to the heritage (*Trotter v. Rothead*, Jan. 12, 1681, M. 2375); the remaining third is the dead's part. Where the wife predeceases without children, one-half is retained by the husband, the other falls to her next of kin.<sup>(o)</sup> Where she leaves children, the division ought also to be bipartite, by the common rules of society, since no legitim is truly due on a mother's death; yet it is in practice tripartite; two-thirds remain with the surviving father, as if one-third were due to him *proprio nomine*, and another as administrator of the legitim for his children; the remaining third, being the wife's share, goes to her children, whether of that or any former marriage, for they are all equally her next of kin.<sup>(o)</sup>

in case of the wife's predecease.

7. Before a testament can be divided,<sup>(p)</sup> the debts owing by the deceased are to be deducted; for all executry must be free. As the husband has the full power of burdening the goods in communion, his debts<sup>(q)</sup> affect the whole, and so lessen the legitim and the share of the relict, as well as the dead's part. His funeral charges, and the mournings and alimony due to the widow, are considered as his proper debts (*Moncrieff v. Monipenny*, June 20, 1713, M. 3945); but the legacies, or other gratuitous rights granted by him on

What debts affect the whole executry;

(22)

and what affect only the dead's part.

of a testamentary provision in lieu of *jus relictæ* operates, like the acceptance of a provision by a child in lieu of legitim after the parent's death (see *infra*, § 9), to increase the fund charged with the provision, and has no effect on the legitim (*Fisher v. Dixon*, June 16, 1840, 2 D. 1121; July 6, 1841, 3 D. 1181, aff. April 6, 1843, 2 Bell's App. 63; *Campbell's Trs. v. Campbell*, July 15, 1862, 24 D. 1321, overruling *Andrews v. Sowers*, March 2, 1836, 14 S. 589).

(o) On a wife's predecease her representatives have now no right to any share of the goods in communion, and these goods are not affected by any legacy or testamentary disposition made by her (18 Vict. c. 23, § 6).

(p) This ordinary expression for the division of the goods in communion is improper (Inst. t. iii. 9, § 19), and has gone into disuse.

(q) Including provisions to the wife by marriage-contract, in regard to which she has been invested with a proper right of credit (Inst. l. c.; see above, b. iii. t. viii. §§ 17, 18), and including also provisions to children (b. iii. t. ix. § 22).

deathbed affect only the dead's part. Bonds bearing interest due by the deceased cannot diminish the relict's share; because such bonds, when due to the deceased, do not increase it (1661, c. 32). The funeral charges of the wife predeceasing fall wholly on her executors who have right to her share.(r) Where the deceased leaves no family, neither husband, wife, nor child, the testament suffers no division, but all is the dead's part.

What children  
are entitled to  
the legitim.

(17)

8. The whole issue of the husband, not only by that marriage which was dissolved by his death, but by any former marriage, have an equal interest in the legitim; otherwise the children of the first marriage would be cut out, as they could not claim the legitim during their father's life. But no legitim is due—(1.) Upon the death of a mother. (2.) Neither is it due to grandchildren upon the death of a grandfather; perhaps because the immediate father is presumed to have renounced that right before his death upon receiving his just share of the effects of the deceased.(s) Nor (3.) to children forisfamiliarated—i.e., to such as, by having renounced the legitim, are no longer considered as *in familia*, and so are excluded from any further share of the moveable estate than they have already received.

Renunciation  
of the legitim,  
how inferred;

(23)

9. As the right of legitim is strongly founded in nature, the renunciation of it is not to be inferred by implication; neither by the child's carrying on an employment by himself, nor by his marriage, nor even by his accepting a provision from his father, unless it specially bear to be in satisfaction of the legitim.(t) Renunciation by a child of

(r) See § 6, note (o).

(s) "This reasoning is unsound; for if the child survive his father the legitim vests in him without confirmation, and transmits to his next of kin. It is only in the case of the child's predecease that the rule of the text applies," where no presumption of renunciation can arise from "the immediate father not claiming it." See Inst. l. c. and Lord Ivory's note (No. 598).

(t) "But as one, while he has neither wife nor child, has absolute power over his whole estate, he may by marriage-contract settle provisions on his younger children to be procreated of the marriage, in satisfaction of legitim, which, though never accepted of by them, will effectually exclude their right to it;" Inst. l. c. (see *Breadalbane's Trs. v. M. Chandos*,

his claim of legitim has the same effect as his death, in its effects. favour of the other children entitled thereto; and, consequently, the share of the renouncer divides amongst the rest;(u) but he does not thereby lose his right to the dead's part if he does not also renounce his share in the father's executry (see *Campbell v. Campbell*, 1738, M. 9265). Nay, his renunciation of the legitim, where he is the only younger child, has the effect to convert the whole subject thereof into dead's part, which will, therefore, fall to the renouncer himself as next of kin, if the heir be not willing to collate the heritage with him (*Martin v. Agnew*, 1749, M. 8167.(v))

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Jan. 20, 1836, 14 S. 309, Aug. 16, 1836, 2 S. & M'L. 377; *Keith v. Keith's Trs.*, July 17, 1857, 19 D. 1040). "An antenuptial contract of marriage has the effect of constructively discharging the claim of legitim, if it conveys the *universitas* of the moveable succession to the children, subject to a power of division in the parents (*Home v. Watson*, 1757, 5 B.S. 330); or to the wife in liferent and the children in fee, as in the case of *Fisher v. Fisher's Trs.* (Dec. 5, 1850, 13 D. 245), where the claim of the younger children to legitim on their father's death was held barred in a question with the surviving widow."—MOIR.

(u) *Lashley v. Hogg*, 1792, 3 Pat. 247; *Fisher v. Dixon*, June 16, 1840, 2 D. 1121, aff. April 6, 1843, 2 Bell's App. 63. The principle established by these cases is thus stated by Lord Colonsay:—"When the father by transaction in his lifetime extinguishes the claim for legitim which the child in the event of survivance has been entitled to make against the succession, the effect of that transaction is to relieve the succession from the eventual claim of that child, just as if the child had died or been forisfamiated. That relief to the succession is what the father acquires by the transaction. But the succession so relieved becomes, on the death of the father, subject to the operation of the law, and must undergo the division which the law has appointed in regard to the moveable succession of every man. Whereas, when no transaction binding on the child has taken place during the father's lifetime, and when, by the father's death, the right to legitim has opened to and become fully vested in the child, and such child agrees to take in lieu thereof a provision which the father had put in his option, that is a transaction not with the father, but with his representatives, who in that way satisfy the claim, and are entitled to the benefit of the relief so obtained (*L. Panmure v. Crotat*, Feb. 29, 1856, 18 D. 703)."—MOIR. See also *Buchanan v. Buchanan's Trs.*, March 7, 1876, 3 R. 556; *Douglas v. Douglas*, Nov. 8, 1876, 4 R. 105; *Jack's Trs. v. Marshall*, Jan. 21, 1879, 6 R. 543.

(v) "Supposing that there is neither a direct discharge of legitim by antenuptial provision, nor a discharge subsequently granted, the claim  
 Implied discharge of legitim.

Collation  
among the  
younger  
children,

(24, 25)

in what cases  
excluded.

10. For preserving an equality among all the children who continue entitled to the legitim we have adopted the Roman doctrine of *collatio bonorum*, whereby the child who has got a provision from his father is obliged to collate it with the others, and impute it towards his own share of the legitim; but if, from the deed of provision, the father shall appear to have intended it as a *præcipuum* to the child, collation is excluded. This intention was presumed from a clause that the child was to continue a bairn in the house (*Beg v. Lapraik*, Nov. 18, 1737, M. 12,851 and 2379).<sup>(w)</sup> A child is not bound to collate a heritable subject provided to

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may yet be barred in other ways. If a father executes a *general* settlement of his whole moveable estate in favour of trustees or others, containing a certain provision in favour of a child who might otherwise have claimed legitim, and that child accepts the provision so made, he cannot also claim legitim. For the general disposition is a disposition of the legitim fund as well as of the whole residue of the deceased's estate; and as the bequest to the legatee was given on the footing that all the moveable estate was effectually carried for the purpose of the testament, he cannot claim the benefit of the legacy while he carries off as legitim a large portion of the fund out of which the legacies were to be payable. And the same rule holds whether the testamentary deeds are one or many, for all are to be read together as constituting one settlement (*Breadalbane's Trs. v. M. Chandos*, March 5, 1840, 2 D. 731, aff. Aug. 16, 1846, 2 S. & M'L. 377). If the settlement be only a *partial* and not a *total* one, the acceptance of a legacy or special provision does not exclude the legatee from claiming legitim (see L. Glenlee in *Collier v. Collier*, July 6, 1833, 11 S. 913). Suppose a person in whose favour a provision has been made by settlement repudiates the settlement, and betakes himself to his legal right, what becomes of the provision itself? (1.) If a provision be given to a person in *life*, and to his *children in fee*, and he repudiates and claims his legitim, his repudiation will not deprive the children of their right in fee (*Ewen v. Watt*, July 15, 1828, 6 S. 1125; *Fisher v. Dixon*, Nov. 24, 1831, 10 S. 55, aff. 6 W. & S. 431). (2.) Where, in consequence of the repudiation a certain portion of the succession is set free, the benefit of this succession enures to the residuary legatees, or to the heirs of the settler (*Breadalbane's Trs. v. Lady E. Pringle*, Jan. 15, 1841, 3 D. 357).—MOIR.

<sup>(w)</sup> This is said in Inst. l. c. to be but a slight evidence of the father's purpose that the child is not to collate, "for collation is admitted only among those who are entitled to a legitim." It seems that a child cannot be obliged to collate a provision made by the father on deathbed, which does not diminish the legitim fund (Inst. l. c.).

him because the legitim is not impaired by such provision (*D. Buccleugh v. E. Tweeddale*, Feb. 14, 1677, M. 2369). As this collation takes place only in questions among children who are entitled to the legitim, the relict is not bound to collate donations given her by her husband in order to increase the legitim; and, on the other part, the children are not obliged to collate their provision in order to increase her share.(x)

11. As an heir in heritage must complete his titles by Confirmation entry, so an executor is not vested in the right of the moveable estate of the deceased without confirmation; which therefore is called by some lawyers, though improperly, the *aditio hæreditatis in mobilibus*. Confirmation is a sentence of the Commissary or Bishop's Court, empowering an executor, one or more, upon making inventory of the moveables pertaining to the deceased, to recover, possess, and administer them, either in behalf of themselves or of others interested therein. The bishop was in all confirmations entitled to the twentieth part of the moveables, called the quot of the testament, which was anciently computed without deduction of debts. Quots were first prohibited during the usurpation by 1641, c. 61, which Act was revived by 1661, c. 28. They were soon thereafter restored (1669, c. 19), with this restriction, that they should be paid out of the free gear, *deductis debitis*; and now they are again prohibited (1701, c. 14), without prejudice to the dues of court payable at confirmation.(y) Testaments must be confirmed in the commissariat where the deceased had his principal dwelling-house at his death (*Commissaries of Edinburgh v. E. Panmure*, Feb. 7, 1672, M. 4847). If he had no fixed residence, or died in a foreign country, the confirmation must be at *Edinburgh*, as the *commune forum*; but if he went abroad with an intention to return, the commissariat within which he resided before he left Scotland is the only proper court (1426, c. 89).

(27-29)

Quot of testaments.

Before what commissariat must the testament be confirmed.

12. Confirmation proceeds upon an edict which is affixed

Form of confirmation.

(x) *M. of Breadalbane v. M. Chandos*, 14 S. 309, Aug. 16, 1836, 2 S. & M'L. 377; *Keith v. Keith's Trs.*, July 17, 1857, 19 D. 1040. (31, 32)

(y) All compositions in respect of confirmation were abolished by 4 Geo. IV. c. 97, § 1.

Confirmation  
of a testament  
testamentary;

(32)

of a testament-  
dative.

Confirmation  
must be upon  
inventory.

(33)

on the door of the parish church where the deceased dwelt, and serves to intimate to all concerned the day of confirmation, which must be nine days at least after publishing the edict.(z) In a competition for the office of executor, the commissary prefers, *primo loco*, the person named to it by the deceased himself, whose nomination he ratifies or confirms, without any previous decerniture; this is called the confirmation of a testamentary. In default of an executor named by the deceased, universal disponees are, by the present practice, preferred (*E. Crawford v. Ure*, 1755, M. 3818); after them the next of kin, then the relict, then creditors, and lastly, special legatees. All these must be decerned executors by a sentence called a decree-dative; and if afterwards they incline to confirm, the commissary authorises them to administer, upon their making inventory, and giving security to make the subject thereof forthcoming to all having interest; which is called the confirmation of a testament-dative.

13. Executors were by our ancient practice obliged to confirm the whole moveable estate of the deceased, and for that end it behoved them to give up the inventory on oath (Cr. 348, § 2; Hope, Min. Pr. p. 25); and if any new subject came afterwards to their knowledge, they were allowed to add it to the principal testament; but now the commissaries must admit whatever inventories are offered (*Brodies v.*

(z) The mode of obtaining confirmation, which now falls within the jurisdiction of the sheriffs of counties, on whom the office of commissary is devolved, is regulated by 21 & 22 Vict. c. 56. It is provided "by §§ 9 & 12 that where the deceased dies domiciled in Scotland, and has in addition to property there property also in England, and which can only be taken up by obtaining probate or letters of administration in England, the Scotch confirmation, when produced in the English Court of Probate, shall be sealed with the seal of the Court, and shall thereafter have the like force and effect as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate. There is a similar provision in regard to a Scotch confirmation produced in the Court of Probate of Dublin (§ 13). If probates or confirmations have been taken out in conformity with the directions of the statute, it is declared by 23 Vict. c. 30, that all persons paying to the executor on the faith of such probates and confirmations are protected, notwithstanding any defect or circumstance whatever affecting their validity."—MOIR.

*Stephen*, 1753, M. 3911). (a) Where no person applied for the office, the bishop, that he might be secured of his quot, could by our former practice charge all having interest to confirm upon general letters of horning; and if there was no appearance, he preferred to the office his own procurator-fiscal, who was thereby entitled to the whole dead's part, till one having an interest claimed the office, who was, of course, decerned executor-surrogate—i.e., executor in his room; but all charges to confirm are now prohibited, except at the suit of the widow, children, or others having interest, by 1690, c. 26.

14. A creditor whose debtor's testament is already confirmed may sue the executor, who holds the office for all concerned, to make payment of his debt. Where there is no confirmation, he himself may apply for the office, and confirm as executor-creditor, which entitles him to sue for and receive the subject confirmed for his own payment. And where one applies for a confirmation as executor-creditor, every co-creditor may apply to be conjoined with him in the office. As this kind of confirmation is simply a form of diligence, creditors are (by Act S., Nov. 14, 1679) exempted from the necessity of confirming more than the amount of their debts. (b)

15. A creditor whose debt has not been constituted, or his claim not closed by decree during the life of his debtor,

General letters, charging to confirm, are now discharged.

The creditor of the deceased may cite the executor, or may himself confirm.

(34)

A creditor in a debt constituted may charge the next of kin to confirm.

(35)

(a) An executor must confirm the whole moveable estate of the deceased known at the time upon oath (4 Geo. IV. c. 98, § 3); and the confirmation of executors-creditors is limited to the amount of their debt, and the sum confirmed to which they make oath (*ib.* § 4). Provision is made for an additional inventory of estate afterwards discovered (*ib.*, and 16 & 17 Vict. c. 59, § 8; see as to procedure in regard to inventories the Revenue Statutes, 44 Geo. III. c. 48, § 23, 48 Geo. III. c. 149, § 38).

(b) An executor-creditor intromitting with more than the amount of his debt is bound to use diligence (Inst. l. c.). The confirmation of the executor-creditor is merely a diligence, leaving the radical interest in the fund still liable to be attached by the confirmations of other creditors (see *Smith's Trs. v. Grant*, June 27, 1862, 24 D. 1142). The conjunction of other creditors in the confirmation is competent even after decree (*Willison v. Smart*, Dec. 17, 1840, 3 D. 273).

has no title to demand directly the office of executor *quâ* creditor; but he may charge the next of kin who stands off to confirm, who must either renounce within twenty days after the charge, or be liable for the debt; and if the next of kin renounces, the pursuer may constitute his debt, and obtain a decree *cognitionis causâ* against the *hæreditas jacens* of the moveables, upon which he may confirm, as executor-creditor to the deceased (1695, c. 41). Where one is creditor, not to the deceased, but to the next of kin, who stands off from confirming, he may, by the same statute, affect the moveables of the deceased, either by requiring the procurator-fiscal to confirm and assign to him, or by obtaining himself decerned executor-dative to the deceased, as if he were creditor to him and not to his next of kin.(c)

A creditor to the next of kin; how he may recover his debt.

Confirmation *ad omisâ vel male appretiata*.

(36, 37)

In this sort, the first executor must be cited.

16. Where an executor has either omitted to give up any of the effects belonging to the deceased in inventory, or has estimated them below their just value, there is place for a new confirmation *ad omisâ vel male appretiata*, at the suit of any having interest. The estimate put on the executry goods by the deceased himself, however low, must stand good as to the dead's part, over which he has full power. In this confirmation the executor in the principal testament must be cited, because it has the effect to exclude him from a part of the administration to which his office entitles him; and if it appears that he has not omitted or undervalued any subject *dolose*, the commissary, in place of naming a new executor, will ordain the subjects omitted, or the difference between the estimations in the principal testament and the true values, to be added thereto; but if *dole* shall be presumed, the whole subject of the testament *ad omisâ vel male appretiata* will be carried to him who confirms it, to the exclusion of the executor in the principal testament (*Robertson v. Robertson*, Feb. 16, 1703, M. 3498).

Executry is not descendible to heirs.

17. Executry, being an office, is not descendible to heirs;

(38)

(c) If the next of kin fail to renounce, he may renounce in an action brought against him as a vitious intromitter in terms of the statute cited, but he will be liable for expenses of process incurred through his failure timeously to renounce (*Davidson v. Clark*, Dec. 13, 1867, 6 Macph. 151).

where, therefore, there is but one executor, the office dies with himself; if there are two or more it accrues to the survivors. Where all the executors happened to die while any part of the testament remained not executed—i.e., before they had obtained possession, payment, decree, or new security for the debts in their own name—an executor might, by our former practice, have been named *ad non executa*; but now, for near a century, confirmations *ad non executa* have been seldom used; for wherever a testament is confirmed for the executor's own behoof—e.g., by the next of kin—or by an executor-creditor for his own payment, such confirmation is adjudged to have the effect of an assignation or procuratory *in rem suam*, whereby the full right of the subjects confirmed, and, consequently, that of execution, is transmitted to the representatives of the persons confirming (*Bells v. Wilkie*, Feb. 12, 1662, M. 9250; *Mitchell v. Mitchell*, June 23, 1737, M. 3900).

18. The legitim and relict's share, because they are rights arising *ex lege* in consequence of the communion of goods, and of the natural obligation upon fathers to give a certain portion of their estates to their issue, operate *ipso jure*, upon the father's death, in favour of the relict and children; and consequently pass from them, though they should die before confirmation, to their next of kin; whereas the dead's part, which falls to the children or other next of kin in the way of succession, remains, if they should die before confirming, *in bonis* of the first deceased; and so does not descend to their next of kin, but may be confirmed by the person who at the time of confirmation is the next of kin to the first deceased. (d) Special assignations, though neither intimated nor made public during the life of the granter, carry to the

Executors  
*ad non executa*.

Legitim and  
relict's part  
transmit with-  
out confirma-  
tion.

(30)

The dead's part  
does not.

Special assign-  
ation and  
legacies need  
not be con-  
firmed.

(d) Formerly confirmation was not only requisite to give an active title to the executor, but to vest the right in cases of intestate succession in the next of kin. But by 4 Geo. IV. c. 98, it is enacted, that from and after 19th July, 1823, in all cases of intestacy the succession thus vests in the next of kin without confirmation; so it passes, not merely to their next of kin, but to their assignees and creditors (*Smith v. Thomas*, Feb. 9, 1830, 8 S. 460; *Frith v. Buchanan*, March 3, 1837, 15 S. 729; *Moin v. McCall*, June 7, 1844, 6 D. 1112).

Possession of moveables equal to confirmation.

assignee the full right of the subjects assigned, without confirmation (1690, c. 26). Special legacies are really assignments, and so fall under this statute (*Gordon v. Campbell*, 1729, M. 14,384). The next of kin, by the bare possession of the *ipsa corpora* of moveables, acquires the property thereof without confirmation, and transmits it to his executors (*Macwhirter v. Millar*, Nov. 14, 1744, M. 1439).

Partial confirmation of the next of kin transmits the whole.

(30)

19. The confirmation of any one subject by the next of kin, as it proves his right of blood, has been by our later decisions adjudged to carry the whole executry out of the testament of the deceased, even what was omitted, and to transmit all to his own executors (*Exrs. of Murray v. Murray*, Jan. 23, 1745, M. 3902).<sup>(e)</sup> The confirmation of a stranger who is executor-nominated, as it is merely a trust for the next of kin, has the effect to establish the right of the next of kin to the subjects confirmed, in the same manner as if himself had confirmed them. An executor decerned, who is not willing to put himself to the expense of confirming doubtful debts, may, even before confirmation, sue the debtors of the deceased, if he gets a licence from the commissary for that purpose; but such licences being intended only for saving expense where there is a danger of getting nothing, are granted *excludendo sententiam*; and therefore, if the executor shall, before confirmation, take decree for the debt, the decree is null. Diligence used by an executor upon a licence falls if he should die before confirmation, since the licence is merely a personal permission, which dies with the person licensed (*Jackson v. Cockburn*, June 30, 1705, M. 3890).<sup>(f)</sup>

Executors hold the office *pro indiviso*.

(40)

20. Where there are two or more executors, they hold the office *pro indiviso*, or as one person: all of them must therefore concur in suing the debtors of the deceased (*L.*

(e) Partial confirmation is not now allowed.

(f) It is now held that an executor-nominate or dative has a title to sue without confirmation, but he must confirm before extract (*Chalmers v. Watson*, May 12, 1860, 22 D. 1060; *Bones v. Morrison*, Dec. 21, 1866, 5 Macph. 240). Foreign letters of administration are a good title to sue (Inst. l. c.), and even a foreign appointment duly attested (*Disbrow v. Mackintosh*, Nov. 27, 1852, 15 D. 123).

*Lag v. —*, March 8, 1634, M. 14,689); and if any one shall refuse to concur, he may be excluded from the office at the suit of the co-executors; but after a debt comes to be established in their person by decree, each executor may, by himself, sue for his particular share thereof; and the debtor may safely make payment to him of such share (*Semple v. M'Nish & Dobie*, March 17, 1630, M. 2739, 14,688). Yet a debtor to the executry ought not to make payment of any part of his debt to an executor-creditor without concurrence of the other executors; because the right of an executor-creditor depends entirely on the lawfulness of his debt, which the co-executors have an interest to inquire into before payment (*Inglis v. Mirrie*, Nov. 7, 1738, M. 14,690). (g) As all the co-executors have an equal right in debts due to the deceased, they are liable only *pro rata* in debts due by him, unless it shall appear that he who is sued has by himself intermeddled with as much of the executry-effects as the debt sued for amounts to (*Salmon v. Orr's Exrs.*, July 22, 1630, M. 14,688).

After execution the subjects divide among them.

Co-executors are liable only *pro rata*.

21. Executry, though it be sometimes said to carry a certain degree of representation of the deceased, is properly an office: executors, therefore, are not subjected to the debts due by the deceased beyond the value of the inventory; but, at the same time, they are liable in diligence for making the inventorye ffectual to all having interest. (h) A decree and registered horning (i) is held to be sufficient diligence against debtors. An executor-creditor who confirms more than his debt amounts to, is liable in diligence for what he confirms (see Act S., Nov. 14, 1679). Executors are not

Executors are not liable *ultra vires inventarii*.

(41)

Diligence prestable by executors.

Executors, whether liable for interest.

(g) Though trustees may act by a majority (*Blyth's Trs v. Hall*, Feb. 7, 1854, 16 D. 482), the power of executors to do so remains doubtful. It seems, as stated above, that executors *quâ next of kin* may sue separately, each for his own share (*M'Target v. M'Target*, May 12, 1829, 7 S. 591); and in special cases the title of executor to sue without the concurrence of co-executors has been sustained (*Rogerson v. Barker*, March 9, 1833, 11 S. 563; *Torrance v. Bryson*, Nov. 24, 1841, 4 D. 71).

(h) An instructive instance of an executor being made liable for negligence in recovering a debt due to the deceased will be found in *Forman v. Burns* (Feb. 2, 1853, 15 D. 362).

(i) Now "charge."

liable in interest, even upon such bonds recovered by them as carried interest to the deceased (*Countess of Caithness v. E. Rosebery*, June 3, 1747, M. 534), because their office obliges them to retain the sums they have made effectual, in order to a distribution thereof among all having interest. And, on the same principle, though an executor should put out the executry-money, after it is in his hands, at interest, he is not liable in interest; for as by his office he ought to have retained the moneys, he lends on his own risk, and consequently is entitled to the whole profits (*Creditors of Thomson v. Monro*, July, 1730, M. 534). (j)

Executors are trustees for all having interest.

(42)

22. Since executors are trustees for all who have interest in the executry, they cannot, even after the debts due to the deceased are established in their own person, assign them to the damage of those concerned; nor can the effects of the deceased fall under the executor's escheat farther than the executor's proper interest reaches (*Gordon v. L. Drum*, Dec. 21, 1671, M. 3894). On the same ground, the creditors of the deceased may affect by diligence not only the original subjects confirmed in the testament, but even bonds taken payable to the executor himself, if they were granted as the value of executry-goods; and hence, also, an executor must communicate to all having interest in the executry the benefit of the eases got in transacting the debts acquired by him after confirmation, from which period he became their common trustee (*Mackenzie, n.r.*, June 4, 1747).

Executors may pay *primo venienti*.

(43)

23. As there was no method to come at the knowledge of all the personal creditors of a person deceased, executors might at first have paid *primo venienti* to that creditor who

(j) "The executor is liable for the due and safe investment of the funds; but he is not liable for money lost by having been left in the bank where the deceased had placed it. He is liable for interest on sums bearing interest at the death; on moveables from the expiration of six months after the death; and on debts from a year after the death" (Bell's Prin. 1900). That is to say, he is not liable in interest on outstanding debts during the first year beyond the amount he has actually received. Afterwards, he is in default, and will be chargeable with interest, unless he shows cause to the contrary (*Howat's Trs. v. Howat*, Feb. 17, 1838, 16 S. 627).

first obtained a sentence; but, being judicial trustees, they could not pay any debt without the authority of a sentence, except those called privileged, which always were, and still continue, preferable to every other debt. Under that name are comprehended medicines furnished to the deceased on deathbed, physicians' fees during that period, funeral charges, which include whatever is necessary for the decent performance of the funeral (*Hall v. M'Aulay & Lindsay*, 1753, M. 4854), and the rent of his house, and his servants' wages, for the year or term current at his death.(k) The executor might by our former law have also retained the executry-effects for the payment of his own debts (*Adie v. Gray*, Jan. 26, 1628, M. 9687), even though he had obtained no warrant from the commissary to retain.(l) And he could have paid the debts which were acknowledged by the deceased himself in his testament without sentence, if, before payment, he was not interpellated by another creditor (*L. Curryhill v. Cumming's Exrs.*, March 31, 1624, M. 3864). But by Act S., Feb. 28, 1662, all creditors who either obtain themselves confirmed, or who cite the executor already confirmed, within six months after their debtor's death, are preferred, *pari passu*, with those who have done more timely diligence. Since which Act, no executor can either retain for his own debt, or pay a testamentary debt, so as to exclude any creditor who shall use diligence within the six months, from the benefit of the *pari passu* preference; neither can a decree for payment of debt be obtained in that period against an executor; because, till that term be elapsed, it cannot be known how many creditors may be entitled to the fund in his hands. If no diligence be used within six months, the

Privileged debts may be paid without sentence;

and debts due to the executor himself;

and testamentary debts.

*Pari passu* preference by Act of Sederunt.

(k) Wages due to farm-servants of a bankrupt tenant are declared privileged by A. S., Jan. 23, 1779; and the Act extends to farm-servants hired by the day to perform harvest work, as well as to those hired for a term (*Lockhart v. Paterson*, 1804, M. App. "Privileged Debts," 2). See Bell's Prin. 1402, 1409.

(l) A trustee or executor is entitled to retain for debts due to himself (Bell's Com. ii. 84); and such debt, or one due by the executor to the deceased, becomes extinguished *confusione* at the expiry of six months after the death, if the creditors have not taken proceedings within that period to effect payment (*Elder v. Watson*, July 2, 1859, 21 D. 1122).

Executor cannot pay even on decrees, if interpellated.

Priority of citation after the six months gives no preference.

Creditors of the next of kin.

Exoneration of executors.

(47)

executor may, as at first, retain for his own debt, and pay the residue *primo venienti*; but if, before actual payment upon a decree, another creditor should interpell him by a citation, the executor must call both in an action of multiplepoining, that the last may have an opportunity of objecting to the other's ground of debt or diligence (*White v. Lady Yester*, Dec. 16, 1629, M. 3869). And he can make no payment even on decree, without bringing into the field the testamentary creditors; because he is interpellated as to these by the testament, which is his own title (*Duff v. Alves*, March 8, 1631, M. 3869). In a competition between diligences used after the six months, the preference was formerly governed by the priority of the citations (*Sir Ja. Gray v. Callender*, July, 1723, M. 3140).<sup>(m)</sup> But by the later practice the first citation founds no preference by itself (*Graeme v. Murray*, Feb. 15, 1738, M. 3141). Such creditors of the deceased as have used diligence within a year after their debtor's death are preferable on the subject of his testament to the creditors of his next of kin; but after that period these postponed creditors have access to it, in terms of the Act 1695, c. 41.

24. Executors who want to be discharged of their trust, and to have their accounts settled, insisted, by the old practice for decrees of exoneration before the commissaries, which contained a particular inventory of the funds belonging to the deceased, and how they were applied (*Stair*, iii. 8, § 75). But this action is now disused; and executors, when they are sued by creditors before the judge competent, are admitted to plead, by way of exception, that the inventory is exhausted by lawful payments. If there are any debts due to the deceased which the executor has not been able to recover from the debtors, he will be exonerated as to these, by producing to the Court decrees and registered hornings, and by granting assignations thereof to the creditors on the executry, according to their several preferences, that they may sue for payment in their own names.

Passive title of vitious intermissions;  
in decrees  
(40, 53, 56)

25. The only passive title in moveables is vitious intermission, which may be defined an unwarrantable inter-

(m) This was reversed (*Robertson's App.* 483; see *Bell's Com.* ii. 84).

meddling with the moveable estate of a person deceased without the order of law. This is not confined, as the passive titles in heritages are, to the persons interested in the succession, but strikes against all intromitters; because even strangers, when attending on dying persons, have frequent opportunities of intermeddling with moveables, which are more easily abstracted than heritage. The bare intermeddling infers this passive title, though the thing intermeddled with should not be applied to any use by the intromitter (*Archibald v. Lawson*, June 29, 1705, M. 9829).<sup>(n)</sup> Where an executor confirmed intermeddles with more than he has confirmed, he incurs a passive title; fraud being, in the common case, presumed from his not giving up in inventory the full subjects intermeddled with (*Drummond v. Campbell*, Dec. 13, 1709, M. 14,414). Vicious intromission is presumed (by Act S., Feb. 23, 1692) in the special case where the repositories of a dying person are not sealed up, as soon as he becomes incapable of sense, by his nearest relations; or, if he dies in a house not his own, they must be sealed by the master of such house, and the keys delivered to the judge-ordinary, to be kept by him for the benefit of all having interest.<sup>(o)</sup>

26. The passive title of vicious intromission takes no place—(1.) Where the subject intermeddled with was truly no part of the estate of the deceased, or ceased to be such before the intromission—*e.g.*, where the goods of one who

against whom  
it strikes;

from what acts  
it is inferred.

Presumed  
vicious intro-  
mission intro-  
duced by Act  
of Sederunt.

Vicious intro-  
mission ex-  
cluded where  
the subject  
was not the  
defunct's;

(51-53)

(n) But it is not vicious intromission merely to continue the possession of a subject acquired from the deceased during his life (Inst. l. c.); and in modern practice "any probable title of intromission or circumstances removing the presumption of fraud, and affording a check on the intromission, will relieve against the penal consequences" (Bell's Prin. 1921; Com. i. 661; see Inst. iii. 9, 53, *infra*, § 26; *Dudgeon v. Dudgeon's Trs.*, March 9, 1844, 6 D. 1015; *Adam v. Campbell*, June 17, 1854, 16 D. 964; *Gardner v. Davidson*, 1802, M. 9840; *Gardner v. Stevenson*, Feb. 26, 1830, 8 S. 600).

(o) This applies to the case only where the heir of the deceased is minor, being intended to render more effectual the Act 1672, c. 2, anent tutorial inventories (Inst. l. c.). Breaking up sealed repositorya, or interference with titles or papers, infers this passive title (*Scott v. L. Belhaven*, May 25, 1821, 1 S. 33).

died at the horn are vested in a donatary, or where there is an executor confirmed. For in these cases the intromitter is only accountable to the donatary or executor, whose goods they are by the declarator or confirmation. By special statute (1696, c. 20) the confirmation of an executor-creditor, because it is no more than a step of diligence, does not screen a third party intermeddling from the passive title, unless he claims under the creditor confirmed; but though he should derive no right from the creditor, he seems to be secured by the last words of the Act, if his intromission has been with the special subject confirmed. (p) (2.) It is excluded by any probable title, or by any circumstance that takes off the presumption of fraud—*e.g.*, by a general disposition of moveables, though that is of itself an incompetent right without confirmation (*Scot v. Montgomery*, July 12, 1666, M. 9857); or by the title of sale, though the subject sold had truly belonged to the deceased and not to the seller; or by the small value of the thing intermeddled with (*Stark v. Jolly*, Jan. 22, 1713, M. 9830). In consequence of this rule, necessary intromission, or *custodiæ causâ*, by the wife or children, who only continue the possession of the deceased in order to preserve his goods for the benefit of all concerned, infers no passive title.

in intromission on a probable title;

in intromission *custodiæ causâ*.

Vitiosity purged by confirmation.

(52, 54, 55)

27. Upon the same principle, an intromitter, by confirming himself executor, and thereby subjecting himself to account before action be brought against him on the passive titles, purges or takes off the vitiosity of his prior intromission. (q) And where the intromitter is one who is interested in the succession—*e.g.*, a relict or next of kin—his confirmation at any time within a year from the death of the deceased will exclude the passive title, notwithstanding a prior citation (*Drummond v. Campbell*, Dec. 13, 1709, M. 14,414). As this passive title was intended only for the security of creditors, it cannot be sued upon by legatees; and since it arises *ex delicto*, it cannot be pleaded against the

(p) See *Montgomerie v. Boswell*, Dec. 20, 1841, 4 D. 332.

(q) So also the creditors approving of the proceedings, and taking a dividend, discharge the intromissions (*French v. Muirkirk Iron Co.*, 1779, Hume 435).

heir of the intromitter.(r) As in delicts any one of many delinquents may be subjected to the whole punishment, so any one of many intromitters may be sued *in solidum* for the pursuer's debt, without calling the rest; but the intromitter who pays has an action of relief against the others for their share of it;(s) for as all the penalties of vitious intromission are introduced solely in favour of creditors, he must, in a question with third parties, be considered as having done no wrong to them; and more especially in a question with those who were his fellow-intromitters. If the intromitters are sued jointly, they are liable, not *pro rata* of their several intromissions, but *pro virili* (*Chalmers v. Marshall*, Nov. 16, 1626, M. 14,715).

Vituous intromitters have relief against each other.

28. The whole of a debtor's estate is subjected to the payment of his debts; and, therefore, both his heirs and executors are liable for them in a question with creditors;(t) but as succession is by law divided into the heritable and moveable estate, each of these ought, in a question between the several successors, to bear the burdens which naturally affect it. Action of relief is accordingly given (by 1503, c. 76) to the heir who has paid a moveable debt, against the executor;(u) and though the statute enacts nothing concerning a relief to the executor against the heir for heritable debts, practice has, *ex paritate rationis*, extended it to that case (*Falconer v. Blair*, March 7, 1629, M. 12,487). This relief is not cut off by the deceased's having disposed either his land estate or his moveables with the burden of his whole

Mutual relief betwixt the heir and executor.

(48)

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(r) *Buchanan v. Royal Bank*, Nov. 30, 1843, 5 D. 211. It may, however, be pleaded by way of exception against a claim made by the heir of the intromitter—*e.g.*, to the effect of holding a debt due to him by the deceased extinguished by his intromissions (*Simpson v. Barr*, Nov. 14, 1854, 17 D. 33). It grounds an action against heirs *in valorem* of the intromissions (*Penman v. Brown*, 1775, M. 9836, Hailes 667).

(s) *Wilson v. Taylor*, July 4, 1866, 3 Macph. 1060.

(t) *Walker v. Masson*, July 18, 1857, 19 D. 1099.

(u) To the extent of the executry estate (*Renton v. Renton*, Nov. 14, 1851, 14 D. 35). Where the liability incurred is universal, the relief is unlimited; and the right of relief cannot be exercised to the prejudice of creditors (Inst. iii. 9, 47); or even of legatees (*Greig v. Greig*, June 6, 1854, 16 D. 899; *Bain v. Reeves*, Jan. 29, 1861, 23 D. 416).

debts; for such burden is not to be construed as an alteration of the legal succession, but merely as a farther security to creditors (see *Campbell v. Campbell*, 1747, M. 5213); unless the contrary shall be presumed from the special style of the disposition.(v)

## NOTE A.

## ON THE LAW OF TRUSTS.

**Definition of trusts.** "Erakine's definition of trust (3. 1. 32) is, 'that it is of the nature of depositeion, by which a proprietor transfers to another the property of the subject entrusted, not that it should remain with him, but that it may be applied to certain uses for the behoof of a third party.'"

**Constitution.** "A trust may either be constituted by a trust-disposition, in which the granter expressly declares the purposes of the trust, or by an *ex facie* absolute disposition qualified by a back-bond or relative declaration of trust granted by the trustee. The latter form of trust is usually employed for the creation of trusts *inter vivos*, as for payment of creditors, or the extrication of the truster's affairs. It is attended with this disadvantage, that the real right of property passes to the trustee unqualified by his personal obligation to the truster, and may therefore be carried off by the creditors of the trustee."

**Proof of trust.** "When the estate has been conveyed in terms *ex facie* absolute, the proof of the trust lies on the truster: and by the Act 1696, c. 25, is limited to writ or oath of the trustee. That statute provides that 'no action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be trustee, and against whom, or his heirs and assignees, the declarator shall be intended, or unless the same be referred to the oath of the party *simpliciter*.'"

Application of  
1696, c. 25.

"The statute undoubtedly applies in all questions between the

(v) So legacies cannot be claimed from the heir or disponsee of the real estate, unless expressly made burdens upon it (*Govan v. Seton*, Jan. 28, 1812, F.C.; *Hamilton v. Bennet*, Feb. 14, 1832, 10 S. 330, aff. August 16, 1833, 6 W. & S. 533).

truster and his heirs and the trustee and his heirs. But as between the creditors of the truster and the trustee the Act 1696 is not held to apply, and the true nature of the truster's position and his obligations may be proved *prout de jure*. Thus, in *Scott v. Miller* (Nov. 16, 1832, 11 S. 26), the law was laid down, that 'if any third party has an interest to prove the existence of a trust notwithstanding an *ex facie* ownership, the statute does not apply to him. So between an alleged trustee and a third party, a debtor of the truster, who has been discharged by the truster, the statute does not apply, and he may prove the trust *prout de jure*' (*Middleton v. Rutherglen*, Feb. 8, 1861, 23 D. 526)."

"In practice no formal back-bond or declaration of trust is required; and even where the writ declaring the trust is not holograph or tested, yet if the signature to it be genuine, the requisite of the Act is complied with (*Bryson v. Crawford*, Nov. 14, 1833, 12 S. 39). Docquetted accounts may be held constructively to be the writ of the trustee (*Macfarlane v. Fisher*, May 23, 1837, 15 S. 978). In *Seth v. Hain* (July 14, 1855, 17 D. 1117), opinions were expressed that a trust might be established by entries in the business-books of the trustee kept by himself though without the signature of the trustee; 'but that in such a case the entries must be unequivocal, and their language clearly and unequivocally referable to the existence of a trust, and not admitting of being explained in consistency with the party holding in any other character than that of a trustee.'" In *Walker v. Buchanan, Kennedy, & Co.* (Dec. 11, 1857, 20 D. 269), Lord Deas expressed doubt as to the observations made in the case of *Seth*, although he did not doubt that entries in books might be considered as explanatory of a signed writing."

"If once the existence of a trust be made out by written evidence, parole proof will be allowed as to the extent of the trustee's obligation (*Wood, Small, & Co. v. Spence*, Nov. 14, 1833, 12 S. 32; *Miller v. Oliphant*, 1843, 5 D. 836)."

"These principles will receive effect as to all trusts—(1.) That by force of the trust a full legal estate is created in the person of the trustee, to be held by him against all adverse parties and interests, for the fulfilment of certain ends and purposes distinctly indicated in the trust-deed; (2.) That these uses and purposes, when distinctly declared, operate as qualifications of the trust-right, and give a preference to all the creditors or beneficiaries under the purposes over any one claiming through the trustee for

Writ of trustee.

Parole, when admissible.

General principles.

any obligations contracted by him in his individual capacity ; (3) That the purposes of the trust may be declared either by express directions in the deed of trust or by additions to these to be afterwards made by separate writing relative to the trust ; and (4) That the trust-deed is not considered as divesting the grantor, but leaves in him the reversionary interest in the whole subject of the trust, both heritable and moveable, when the purposes of the trust are fulfilled."

Quorum, *sine quo non*, &c.

"If a certain number of trustees are named without any provision that a majority or a quorum may act, it is implied that the nomination is joint, and all must accept.<sup>(w)</sup> If a certain number be appointed as a quorum, that quorum must accept ; and, as a consequence, where some individual is named *sine quo non* he must accept with the others, or the whole nomination of trustees falls. But the failure of the trustees to accept, or their death before acceptance, does not extinguish the trust, because the Court of Session have always the power of interfering on the failure of the trustees named, and appointing, on the petition of any one interested under the trust, a judicial factor,<sup>(x)</sup> who can take up and carry out the trust management in terms of the directions contained in the trust-deed ; the judicial factor being bound to find caution, and being liable to other provisions in regard to the exercise of his office ; and being, on the other hand, entitled to a salary for the performance of his official duties. In this particular his position is a very different one from that of a trustee nominated by the truster himself, who is not only subject to very strict rules of responsibility in regard to the investment of funds, recovery of debts, and so on, but who can derive no profit from his services as trustee, even if he acts as law-agent or performs other services which must have been paid for if performed by another."

Appointment of judicial factor.

Powers of trustees.

"No powers are presumed to be given by implication which are not necessary for working out the purposes which are declared. On the other hand, whatever powers are necessary for the accom-

(w) Not so if the appointment is indefinite (*supra*, § 20, note).

New trustees appointed by Court.

(x) The Court has now power, on the application of any person having interest in the trust-estate, to appoint new trustees where trustees cannot be assumed under the deed, or where a sole acting trustee has become insane or incapable of acting (30 & 31 Vict. c. 97, § 12) ; and this applies to the case of a lapsed trust (*Zoller, petr.*, March 11, 1868, 6 Macph. 577).

plishment of the declared purposes are presumed by law to be vested in the trustees."(*y*)

"1. As the first purpose of trusts as to succession is generally to sell the payment of debt, it necessarily follows that the trustees shall have the power of selling or disposing of the moveables for that purpose; and among the debts which the trustee is entitled and bound to pay is the expense of alimentering the family of the truster. The Court have even sanctioned the application of a portion of the capital for this latter purpose (*Taylor, petr.*, Feb. 5, 1850, and March 11, 1851, 13 D. 949)."

"2. When the trust consists partly of heritage, which the trustees are to manage and ultimately to divide, the power of making up titles to the heritage is implied. And all the ordinary powers which are incident to the management of heritable property are also presumed to be given—such as the granting of leases of ordinary endurance; the entering of vassals by trustees infeft in the superiority; the cutting of timber for payment of debt; the completion of improvements begun by their constituent; the erection of a mansion-house on land which they are directed to purchase and entail; the appointment of factors and law-agents; the changing of the investment of the trust-funds, more particularly by withdrawing funds invested in a trading company and placing them in less hazardous forms of investment; of which heritable security or the public funds appear to be the only two which, in the absence of special powers, trustees can safely resort to."(*z*)

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(*y*) Now, by 30 & 31 Vict. c. 97, § 2, trustees have power, where such acts are not at variance with the terms or purposes of the trust, to appoint factors and law-agents, and give them suitable remuneration; to discharge trustees who have resigned, and the representatives of those who have died; to grant leases of twenty-one years in agricultural subjects, and thirty-one in minerals, and to remove tenants; to uplift, assign, and discharge debts; to compromise or submit and refer claims; to grant all deeds necessary for carrying into effect these powers; to pay debts due by truster or trust-estate without requiring the creditors to constitute them, if they are satisfied that they are proper debts of the trust. Powers implied by statute.

(*z*) Unless the contrary is provided by the trust-deed, trustees may invest the trust-funds in the purchase of any of the Government stocks, public funds, or securities of the United Kingdom, or stock of the Bank of England; or lend on security of any of said stocks or funds, or on the security of heritable property in Scotland; but this does not restrict or control any powers of investment expressly contained in a trust-deed (30 & 31 Vict. c. 97, § 5).

To sue debtors,  
&c.

"3. The power of suing debtors belongs to trustees, and they cannot in such a matter be controlled by the beneficiary. They sue or decline to sue at their own discretion. They can of course grant discharges to debtors on payment. They have the power of compromising claims (Bell's Prin. § 1998) or of accepting a composition in bankruptcy. It is not yet a settled point whether they have or have not the power to enter into a reference." (a)

To borrow.

"4. They have the power at common law, and without express authority given by the trust-deed, to borrow money for the purpose of carrying into effect the provisions of the trust; and the sums thus borrowed and expended by them will be placed to their credit in accounting with the trust, and they will be entitled to retain the trust-estate in their hands as against the beneficiaries till they are relieved of their obligations. But they cannot directly burden the heritable estate itself (see M'Laren on Wills, &c., ii. 254)." (b)

"The right to borrow on security must be derived from authority conferred by the trustor, though such authority may be deduced by construction or implication from the terms of the deed (*Kinloch and Others*, Dec. 7, 1859, 22 D. 174). If trustees are authorised, either expressly or by implication, to borrow on the security of the estate, it follows that they have power to grant a bond and disposition in security which contains a power of sale (*Stewart v. Kirkcaldy*, Nov. 14, 1849, 12 D. 73)."

To sell heritage  
when author-  
ised.

"5. Trustees have no power of selling the heritage belonging to the trust, except such power is conferred on them by the trust-deed itself. But the power need not be given *in express terms*; it may be implied from the nature of the deed itself (see *Graham v. Graham's Trustees*, Dec. 21, 1850, 13 D. 420). Accordingly, a trust of heritage for the purpose of paying debts implies a power of selling so much of the estate as may be necessary for that purpose; though the power will not be held to extend beyond the necessity (*Buchanan v. Angus*, March 13, 1860, 22 D. 979, as reversed in the House of Lords, May 15, 1862, 4 Macq. 374)."

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(a) See note (y), p. 557, *supra*.

(b) The Court of Session may, on the petition of trustees, give them authority, if satisfied that it is expedient and not inconsistent with the purpose of the trust, to sell the trust-estate or part of it, to grant feus or long leases, to borrow money on the security of the trust-estate, to excamb heritage. These acts may also be done without the authority of the Court, by deed of consent of all the existing beneficiaries if all of age, and if the act in question is "not inconsistent with the purpose of the trust" (30 & 31 Vict. c. 97, § 3).

"6. Where the trust does not confer express power on the trustees, the Court of Session occasionally grant special powers to the judicial factor appointed by themselves; and probably, on the same grounds, similar special powers would be granted to trustees.<sup>(c)</sup> Thus, as already mentioned, they have granted to trustees the power of making necessary advances even out of capital where the revenue was insufficient for the purpose (see *Hamilton*, July 20, 1859, 21 D. 1379, and *Taylor*, March 11, 1851, 13 D. 949). A strong case of necessity, however, requires to be made out before such power will be granted. The Court have also been in the practice of granting authority for parties to renounce leases where circumstances rendered it clearly expedient, as in *Turner's Trustees* (March 1, 1862, 24 D. 694); the minor, e.g., being possessed of no funds which could enable him to carry on the farm to advantage."

"Certain trusts for the accumulation of money beyond a certain period are struck at by what is called the Thellusson Act, an Act arising out of the trust settlements of Peter Thellusson, who had directed an accumulation for a very long period of years."

"By that Act, 39 & 40 Geo. III. c. 98, which was extended to Scotland<sup>(d)</sup> by 11 & 12 Vict. c. 36, § 41, the law stands thus—The period beyond which accumulation may lawfully take place cannot be extended by any Act of the testator beyond the expiration of twenty-one years from his death, or from the birth of a child then *in utero*. Accordingly, the accumulated fund must be paid over at the commencement of the twenty-second year, and not from the date when accumulation commenced. The Statute provides that the accumulations contrary to the provisions of the Act—that is, accumulations beyond the twenty-one years—'shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.' Under this provision it has been held that the accumulations beyond the period permitted by the Statute go to the person who would have been entitled to the capital at the death of the testator (*Lord v. Colvin*, Dec. 7, 1860, 23 D. 112). And the Act equally applies though there should be no express direction to accumulate,

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(c) *Downie, petr.*, June 7, 1879, 6 R. 1013. See also *Lord Clinton, petr.*, Oct. 30, 1875, 3 R. 62; *Campbell, petr.*, June 26, 1880, 7 R. 1032, and Feb. 26, 1881; contrast with *Berwick, petr.*, Nov. 13, 1874, 2 R. 90.

(d) As regards heritable property. It applied to Scotch moveable property from the first.

if accumulation be implied; *Ibid.* In England there had been some fluctuation of opinion on this subject, but the opinion of Lord Cranworth in *Tench v. Cheese* (19 Beavan 324; 6 De. G. M. & G. 453), is to the same effect as that of the Scotch Court in *Lord v. Colvin*. If a testator directs that to be done which, as a consequence, leads to an indefinite accumulation, he must, within the meaning of the Statute, be taken to have directed accumulation."

"§ 2 Declares that the Act shall not extend to any provision for payment of debts, or any provisions for raising portions for children."

Resignation of  
trustees.

"Until recently it was held that trustees who had once accepted could not resign. But the Act 24 & 25 Vict. c. 84, provides that any gratuitous trustee nominated by a trust-deed, and who has accepted and acted under it, may resign his office, subject always to liability for all his acts or intromissions prior to the resignation; and 26 & 27 Vict. c. 115, declares the former Act to be applicable to all trusts, at whatever time they may have been constituted, and to *ex officio* trustees."<sup>(e)</sup>

Liability of  
trustees.

"The responsibility of trustees in the management of the trust may be considered—(1.) As in questions with the beneficiaries under the trust; and (2.) as in questions with third parties."

"It is usual in trust-deeds to introduce a clause for the protection of trustees, declaring that they shall not be liable for omissions, but only for their own actual intromissions, nor for losses arising from the insolvency of factors or agents, and that they shall not be liable for failure to do diligence against debtors. But even with such a clause trustees have been frequently made liable for acts of administration done in *bonâ fide*, but which had resulted in loss to the estate. Assuming, however, that there is no such protecting clause, certain points have been determined. The general rule has been laid down in *Morrison v. Miller* (Feb. 9, 1827, 1 S. 322), and *Jeffrey v. Brown* (July 5, 1821, 1 S. 102, aff. 1824, 2 S. App. 349), that trustees are liable only for *culpa lata*, or gross negligence or misconduct; that they are not liable for errors of judgment, but only for failure or refusal to do their duty, and for exceeding their powers. But when this general rule comes to be compared with

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(e) A form of resignation and provisions for discharge are provided by 30 & 31 Vict. c. 97, §§ 9, 10; which enacts that where a trustee is also executor, his resignation as trustee shall infer his resignation as executor (§ 18).

the decided cases it will be seen that the protection which it affords to the trustees is of a very limited kind."

"If debts are due to the estate which ought to have been realised, and the trustees have neglected to recover, this, though not an intromission, is an omission for which the trustees will be liable. A case of peculiar hardship in this way is *Forman v. Burns* (Feb. 2, 1853, 15 D. 362)."

"Again, in *Moffat v. Robertson* (Jan. 31, 1834, 12 S. 369), although there was a clause declaring each liable only for his intromissions, yet where the trust-deed directed the trustees to see certain annuities secured, and to retain a sum to answer them, and one of the accepting trustees interfered to the effect of authorising the sum required to remain in the hands of the co-trustee on a personal bond without security, it was held that this was a breach of the directions in the trust-deed, for which the trustee who had permitted the fund to remain unsecured was responsible (see also *Seton v. Dawson*, Dec. 18, 1841, 4 D. 328). The leading case on this subject is *Blain v. Paterson* (Jan. 28, 1836, 14 S. 361). The clause of protection there was distinct and ample. Paterson, one of the trustees, wished to uplift £500, which was lying in bank, and for which he was willing to pay 5 per cent. to the beneficiaries instead of bank interest, offering to give heritable security. His co-trustees signed the bank receipt, but did not see to his granting the security. He became insolvent, and a claim was made against the trustees, who were found liable."

"Trustees may incur liability to the trust-estate either by Investments. refusing to invest the trust-funds in the way directed, as in *Wellwood v. Ross* (June 23, 1831, 9 S. 790), or by investing them in a way which the settlement does not justify. If a trustee choose to invest his constituent's money in a concern of which he is a partner, he is held liable to account for a proportion of the profits corresponding to the amount invested, and if loss is sustained or no profits earned, he must account for the money with interest. As Lord Ivory tersely expressed it in *Laird v. Laird's Trs.*, June 26, 1855, 17 D. 984—"The profits accresce to the estate, the loss to the trustee. No trustee can make individual profit out of his trust. In other words, he cannot be *auctor in rem suam*." On the other hand, if no profit has been made or loss has been sustained, the trustee who has embarked the trust-funds in a speculative concern ought to be the sufferer (see *Black v. Cochrane*, Feb. 1, 1855, 17 D. 321)."

"This rule seems just, because in the absence of direct authority it is not to be presumed that the trustor intended that the trust-funds should be so employed. The presumption always is that he intended them *quam primum* to be realised and distributed. The principle applies to banks or incorporated companies as much as to any ordinary trading company, since in all of these the funds of the trust are exposed to hazard. But there is a considerable hardship where trustees are found liable for merely *continuing* to leave the trust-funds invested in the business as they were left by the trustor himself. But without express power given to the trustees it is presumed that the trustor intended to have the concern wound up and the funds withdrawn from all speculative risk as soon as it was in the power of the trustees to do so; and although the point has not yet been decided, the general understanding of the profession is that the doctrine would be carried to this length—that trustees leaving money embarked in a speculative concern which they might have drawn out and invested in a more secure form would be liable for loss arising to the trust-estate."(*f*)

"A trustee ought not to invest in foreign securities, unless power is given by the trust. Where the power is given this will include such securities as would be authorised by the courts of the countries which the testator may be supposed to have had in view, and will therefore include the Government Stock of the State, but not the bonds of moveable or local corporations (*Ellis v. Eden*, 23 Beavan 543)."

Lending on  
personal  
security, bills,  
&c.

"Trustees investing without special authority on personal security, bills, or personal bonds, are liable in the event of loss to replace the money with interest, or to pay such a sum as the beneficiary would have drawn if the fund had been invested on good heritable security, and the interest accumulated. If, again, he invest on insufficient heritable security, he will be bound to make good the loss (*Accountant of Court v. Forsyth*, Jan. 28, 1853, 15 D. 345). Strong remarks were made in *Thomson v. Christie* (June 16, 1852, 1 Macq. 238) on the danger and inexpediency of granting loans on house-property. And in *Perston v. Perston's Trustees* (Jan. 9, 1863, 1 Macph. 245) it was declared illegal for trustees to lend to one of their own number on heritable security; and the security turning out to be insufficient, they were found liable to the trust-estate under the deficiency."

Payment in  
error.

(*f*) See M'Laren on Wills, &c., ii. 520. *Brownlie v. Brownlie's Trs.*, July 11, 1879, 6 R. 1233.

"Trustees making payment to one not entitled to receive it are liable to replace the money. But it was considered a sufficient defence against such liability that the party to whom payment was made possessed and produced an apparent title, though it was afterwards set aside."

"A different rule as to the liability of trustees from that already announced applies where the trustor has either directly permitted or plainly contemplated that his funds should remain in a going business. Here it is obvious that no immediate winding up was intended, and it would require a very strong case to be stated against trustees so acting on the apparent intention of the trustor to make them liable for resulting loss."

Continuance of  
trustor's  
business.

"If trustees are entitled to invest on personal security, an investment by way of deposit of the funds in bank (which of course does not render the depositor partner, or exposed to any of the risks of the concern) is within their powers, and the subsequent failure of the bank would entail no liability on them. But they are not entitled to lend trust-funds to a beneficiary upon his own bill or acknowledgment (*Ross v. Allan*, Nov. 30, 1850, 13 D. 44)."

"It was decided in *Western Bank v. Buchanan* (Feb. 28, 1864, 2 Macph. 695) that where trustees have been received as partners of a joint-stock company, expressly in that character, their co-partners cannot make them liable individually or beyond the amount of the trust-funds. It is said that in England the authorities rather point to a different conclusion." (g)

Buying shares  
of joint-stock  
company.

"By the Act 24 & 25 Vict. c. 84, as explained by 26 & 27 Vict. c. 115, all trusts are held to include the following provisions, unless the contrary be expressed:—A power to resign; a power to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum; and a provision that each trustee shall only be liable for his own acts and intromissions,

Changes by  
recent Acts.

(g) This judgment was reversed June 22, 1865 (3 Macph. H.L. 89, 4 Macq. 950). See also *Muir v. City of Glasgow Bank*, Dec. 20, 1878, 6 R. 392; April 7, 1879, 6 R. H.L. 21. Trustees found liable as partners of an unlimited company are not entitled to recoup themselves out of the trust-funds where the investment was one beyond their powers (*Brownlie v. Brownlie's Trs.*, July 11, 1879, 6 R. 1233). Homologation by the beneficiaries of an unauthorised investment does not relieve the trustees from their liability (*Sanders v. Beveridge*, Nov. 7, 1879, 7 R. 157; see also *Robinson v. Murdoch*, March 10, 1880, 7 R. 694; *City of Glasgow Bank v. Gillespie & Parkhurst*, March 20, 1880, 7 R. 749).

and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions."(*h*)

Trustees cannot be *auctores in rem suam*.

"Certain disabilities are imposed on trustees arising from their position. They cannot be *auctores in rem suam*, or do anything to place their private and individual interest in competition with their duties as trustees. And the same rule applies not merely to trustees proper, but to agents, factors, and managers,—to all, in short, who possess anything of a trust character as acting for others. No one possessing a character analogous to that of a trustee can purchase property belonging to the trust(*i*) (*York Buildings Co. v. Mackenzie*, May 13, 1795, 3 Pat. 378 & 579)." See also *University of Aberdeen v. Mags. of Aberdeen*, July 18, 1876, 3 R. 1087; March 23, 1877, 4 R. H.L. 48.

"The director of a railway company is a trustee, and as such he cannot enter into any transaction with a firm of which he himself is a partner, and the benefit of which would belong to the firm, however fair the contract might be in every respect (*Blaikie v. Aberdeen Railway Co.*, July 20, 1854, 17 D. 20, rev. 1 Macq. 461)."

"The rule has been extended to every case, whether of heritage or moveables, in which any party acts for behoof of another (as Lord Ivory explains it in the case of *Laird v. Laird's Trs.*, June 26, 1855, 17 D. 984), as trustee, tutor, judicial factor, commissioner, agent, the party so acting can take no benefit by any transaction he enters into with the trust-estate. The sale made to him is reducible; the contract made with him cannot be enforced. Nor does it appear to alter the rule that he is only one of a large body of directors who enter into the contract on the other hand, or one of many partners who contract on the other side. The case of *Blaikie* does not precisely solve the point whether if the director of a railway or other company was not present at a meeting at which the contract was resolved on, and took no steps to further the resolution to enter into the contract, the same result would follow. But looking to the rigid way in which this principle has been followed out, it would probably be held that his *adoption* of the contract in his character of partner of the company in which he was interested would have the same effect as if he had been present at the meeting."(*i*)

(*h*) See above, p. 557, note (*g*), and p. 558, note (*b*).

(*i*) But if the beneficiaries are satisfied, third parties, such as persons who have bid at an action, cannot have a sale to a trustee set aside (*Aberdeen v. Stratton's Trustees*, March 29, 1867, 5 Macph. 726). See *Roberts v. City of Glasgow Bank*, Jan. 17, 1879, 6 R. 805.

"But the disability of trustees has been carried even farther. Without impugning the justice or expediency of the rule that a trustee should never place himself in a position where his individual interest may be opposed to that of the trust, it may be questioned whether the principle has not been carried too far in a certain class of cases. For it has been farther held that if he acts in a trust character he is not even entitled to charge for law-business done by him for the benefit of the trust, although he might have declined to do the work, and devolved it on a different law-agent who would have charged against the estate at least as much, perhaps more than he had. The 'purity principle,' as it has sometimes been termed in England, is here carried so far as to operate injuriously, since it very often deprives the trust of the services of the very man whom the truster, if he had named a law-agent, would probably have preferred. But still it must be held as fixed that as the office of a trustee is essentially gratuitous, a trustee who acts as agent for the trust is not entitled to charge either for himself or by his partner for his professional labours; though he may recover 'costs out of pocket' (*Morrison v. Rennie*, July 14, 1847, 9 D. 1483, rev. April 26, 1849, 6 Bell's App. 422; *Flowerdew's Trustees*, Dec. 22, 1854, 17 D. 263; *Gray v. Dundas*, Nov. 12, 1856, 19 D. 1)."

Trustee cannot charge for professional work done for the trust.

"If the trust-deed contains a power to the trustees 'to appoint agents and factors, either of their own number or other fit persons,' this involves the power of appointing one of the trustees as law-agent, with the usual remuneration (*Goodsir v. Carruthers*, June 19, 1857, 20 D. 1141)."(j)

"It may also be held as fixed by *Ommanney v. Smith* (March 3, 1854, 16 D. 721), that where the beneficiaries acquiesce in the employment of one of the trustees as law-agent of the trust, knowing that he was acting on the footing of receiving the usual remuneration, they cannot afterwards plead against him this rule of law."

"When one of several trustees dies and there is a destination to survivors, the trust descends to the survivors without any step being required on the part of these surviving trustees to complete their title. But the point has been considered doubtful when the trust-deed contains no such destination. But the 'true principle is stated by Stair (i. 6, 14), and admits of no doubt. So long as one of the trustees is alive the trust subsists, and the powers can

Trust subsists in survivors.

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(j) See 30 & 31 Vict. c. 97; above, p. 557, note (y).

be competently exercised by that trustee' (*Gordon's Trs. v. Eglinton*, July 17, 1851, 13 D. 1381; *Findlay and Others*, June 30, 1856, 17 D. 1044). The doctrine may now therefore be considered as established."(*k*)

Making up  
titles where  
trustees have  
all died.

"Where all the trustees have died, Mr. Bell (Com. ii. 491) describes the proceedings to be taken thus:—'If heirs have been mentioned in the trust-conveyance, the heir-at-law of the last trustee makes up his title, which may be done by service as heir of provision, and disposes to those having the radical right, or to the judicial factor who may be appointed by the Court, or, if he will not spontaneously do so, a declarator of trust and adjudication directed against the heir of the trustee will accomplish the same purpose. If heirs have not been mentioned there is greater difficulty, as the trust terminates with the trustee's death, and there is nothing in the heir. But the trust-estate is *in hereditate jacens* of the deceased trustee, and his heir has an interest to prevent it from being taken out of it without payment of advances and indemnification for engagements undertaken, and so in this case there is a sufficient ground for calling the heir in a declarator of trust and adjudication in implement.' When a trust has been taken to the office-bearers of a society not incorporated, and to their successors in office, and the office-bearers have been infeft, it has been considered a point of difficulty in what way these successors in office are to make up their title so as to transfer the feudal right to them. Lord Ivory, in the case of *Gardner v. The Trinity House of Leith* (Jan. 23, 1848, 7 D. 293), suggested that the right might be taken up by the successors by service to the former proprietors as *quodammodo heirs of provision*, and that view appears to be consistent with principle. In a certain limited class of cases, such as property held by official persons for *charitable or educational purposes*, the Act 13 Vict. c. 13, comes into operation and transfers the right to the successors without further procedure; but this would not apply to ordinary family trusts. And again, by the Acts 23 & 24 Vict. c. 143, § 38, Titles to Land Act (1858) Amendment, it is provided that where a judicial factor has been appointed on a trust-estate on which a trustee or judicial factor had been previously appointed, and in whom the feudal right to heritable property stood vested, he may by petition apply to the

(*k*) See also *Oswald v. City of Glasgow Bank*, Jan. 15, 1879, 6 R. 461; contrast with *Dawson v. Stirton*, Dec. 4, 1863, 2 Macph. 196.

Court setting forth the lands to which he wishes to complete his title, and the warrant for infeftment granted by the Court operates as a disposition of the lands, or as an assignment of heritable bonds or other heritable securities."(*l*)

"If through the obstinacy of some one trustee the working of the trust is impeded so that injury accrues to the trust-estate, the Court will ordain the obstructive trustee to concur with the others in executing the necessary acts of administration, and will even subject him in any loss which his conduct has occasioned (*L. Lynedoch v. Ochterlony*, Feb. 15, 1827, 5 S. 358)."

"In trusts for creditors, or for the management of the trustor's affairs during his life, it is not the intention of the trustor to divest himself of the fee, but merely to place the trust-estate under interim management, retaining his interest in any residue which remains. The trust is merely as a burden on the fee. The radical right and radical title remain with the trustor notwithstanding the conveyance. And the importance of that principle becomes extreme, since it leaves the trustor's powers as extensive as those of a fee-simple proprietor unburdened."

"The rule was first established by *Campbell v. Campbell of Edderline's Cra.* (Jan. 14, 1801, M. 'Adjudication,' No. 11). Campbell had conveyed his estate to trustees for behoof of his creditors, with a power of sale, and after payment of debts, for execution of a strict entail. The trustees were infeft. After his death adjudications were led by creditors against his son and heir, and other adjudications against the trustees."

Trusts for creditors or for management.  
  
Radical right remains with trustor.

"It was held that the trustor was not completely divested, the trust-right and infeftment 'having been a trust for the grantor's behoof, though it contained a power to the trustees of selling the lands for paying off the grantor's debts, but which power the trustees never exercised, and still stood bound, in the event of a sale, to reconvey and settle the remainder for the behoof of the grantor and his heirs, which did not disable his lawful creditors not acceding to the trust-deed from doing diligence against himself while he lived, or against his apparent heir after his death, for payment or security of their debts.' But while the adjudications led against the apparent heir as representing his father were held

(*l*) The enactments above referred to are consolidated in 31 & 32 Vict. c. 101, § 26; and all beneficiaries absolutely entitled to trust property may now obtain authority to complete title by petition to the Court of Session, under 30 & 31 Vict. c. 97, § 14.

good, it was not found that those led against the trustees were bad. On the contrary, it would seem that in the opinion of the Court, at least of Lord-President Campbell, the adjudications led against the trustees would also have been good if led within year and day of those against the heir. In *M'Millan v. Campbell* (March 4, 1831, 9 S. 551, aff. Jan. 1832, 7 W. & S. 441) it was found that an entail executed by a party who had granted a trust-conveyance for behoof of creditors containing unlimited powers of sale is valid, in virtue of the radical right of property remaining in the truster. See *Giles v. Lindsay* Feb. 27, 1844, 6 D. 771."

"Again, it has been decided that the truster, and not the trustee, has the right of voting in the election of a Member of Parliament (*M'Leod v. M'Kenzie*, Nov. 17, 1827, 6 S. 77, and *Lockhart v. Wingate*, Feb. 19, 1819, F.C.); that his heir must enter by service, which assumes that the ancestor remained proprietor notwithstanding the trust-conveyance (*Bell v. Maxwell*, Dec. 13, 1728, 7 S. 198); and that he can dispose of the residue by testamentary deed, or by marriage-contract (*Renton v. Givson*, Dec. 20, 1833, 12 S. 266, and *Herries, Farquhar, & Co. v. Brown*, March 9, 1838, 16 S. 948)."

But under burden of real rights to creditors.

"Although the truster retains the radical right and the radical title, he does so only under the burden of the real rights which he may have created in favour of creditors, either previous to or by the trust-conveyance. It is the reversion only of his estate after these trusts have been fulfilled that remains subject to his rights as proprietor."

Disposition of residue to third parties entirely divests truster.

"Suppose, however, that under a trust there are not only purposes to be fulfilled, but also a disposition of the whole residue or reversion in favour of third parties, such a disposition is—(1) one which divests the granter entirely; and (2) which is irrevocable by him, if so declared in the trust-conveyance and followed by delivery. After having thus disposed of the whole subjects of the trust, there being no reversion remaining with him, he cannot deal with the subjects to any effect till the conveyance is revoked; and (3) he cannot revoke if an interest in favour of children has been created even by a post-nuptial contract of marriage (*Smitton v. Tod*, Dec. 12, 1839, 2 D. 226; *Turnbull v. Tawse*, April 15, 1824, 1 W. & S. 80; *M'Gibbon v. M'Gibbon*, March 5, 1852, 14 D. 605)."(m)

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(m) *Dunlop v. Johnston*, March 24, 1865, 3 Macph. 758, aff. April 2, 1867, 5 Macph. H.L. 22.

"While the general principle is recognised that the mere existence of a trust-right does not prevent the original proprietor from dealing with the subjects as if he had never been divested, it never seems to have been disputed that in all such cases the apparently absolute right conveyed to the trustee entitles him to deal with the subjects as his own, and that if he has sold them or granted heritable bonds over them, or leases, or any other burden, all these, as flowing from an *ex facie* proprietor infest, are perfectly good, so far as the interests of third parties deriving right from the disponent are concerned. Their dispositions of sale or securities are unaffected by any back-bond which may have passed between the truster and the trustee; and it seems to me, from the decision in *Gardyne v. Royal Bank of Scotland* (March 8, 1851, 13 D. 912; reversed on a different point), that there can be no reasonable doubt that all onerous rights derived from trustees infest on an apparently *ex facie* absolute disposition, followed by infestment in the disponent's person, will be effectual to the holders of such securities. In like manner, such a trust will entitle the trustees holding the apparently absolute right to the subjects to retain them against the truster demanding re-conveyance till all debts, whether due before the constitution of the alleged trust, or becoming due afterwards, shall be paid to the trustees. The truster has been divested; his right resolves into one to demand a re-conveyance when his obligations are satisfied, and the trustees are entitled to plead that they cannot be called upon to denude under the personal obligation to that effect, either implied in the deed itself or expressed by relative back-bond, till all advances or debts paid by them on account of the truster are satisfied; in other words, that the one personal obligation must stand against the other; and the real right to the lands must remain with them till these obligations *hinc inde* are satisfied."—MOIR.

Powers of trustee.

#### TIT. X.—OF LAST HEIRS AND BASTARDS.

1. By our ancient practice, feudal grants taken to the vassal, and to a special order of heirs, without settling the last termination upon heirs whatsoever, returned to the superior upon failure of the special heirs therein contained (Craig, 351, § 11, Dirl. and Stewart, *voce* "Limitations"); but

Where there is no heir the king succeeds.

(1, 2)

now that feus are become patrimonial rights, the superior is by the general opinion held to be fully divested by such grant, and the right descends to the vassal's heirs-at-law. And even where a vassal dies without leaving any heir who can prove the remotest propinquity to him, it is not the superior, as the old law stood (R. M., l. 2, c. 55, §§ 1, 2), but the King, who succeeds as last heir both in the heritable and moveable estate of the deceased, in consequence of the rule *Quod nullius est, cedit domino Regi*.(a)

King's right  
where the  
lands hold of  
himself;

(3, 4)

where they  
hold of a  
subject.

2. If the lands to which the King succeeds be holden immediately of himself, the property is consolidated with the superiority, as if resignation had been made in the Sovereign's hands. If they are holden of a subject, the King, who cannot be vassal to his own subject, names a donatary, who, to complete his title, must obtain decree of declarator, in which a general citation against all and sundry is sufficient (*Crawford v. Edinburgh*, July 31, 1666, M. 3410), and thereafter he is presented to the superior, by letters of presentation from the King under the quarter-seal, in which the superior is charged to enter the donatary to the lands, with all the rights competent to the former vassal.(b) The whole estate of the deceased is in this case subjected to his debts, and to the widow's legal provisions (*Wallace v. Muir*, July 7, 1629, M. 1350), and may therefore be affected either by the adjudication or confirmation of creditors, according to the nature of the right. But in the carrying on of such diligence the Officers of State and the donatary must be cited as parties. Neither the King nor his donatary is liable beyond the value of the succession. A person who has no heir to succeed to him cannot alien his heritage *in lecto* to the prejudice of the King, who is entitled to set aside such deed in the character of *ultimus hæres*;(c) *Goldie v. Murray's Trs.*, 1753, M. 3183.

The King  
succeeds as  
*ultimus hæres*  
to the bastard.

3. A bastard can have no legal heirs except those of his

(5-7)

(a) The Crown, however, will not succeed under a destination to the heir of a bastard (*Torrie v. King's Remembrancer*, May 31, 1832, 10 S. 597).

(b) A donatary cannot take up a lease which excludes assignees (*Falconer v. Hay*, 1789, M. 1355).

(c) The law of deathbed has been abolished.

own body; since there is no succession but by the father; and a bastard has no certain father.(d) The King therefore succeeds to him failing his lawful issue, as last heir. Though the bastard, as absolute proprietor of his own estate, can dispose of his heritage in *liege poustie*, and of his moveables by any deed *inter vivos* (*Ewing v. Semple*, July 20, 1739, M. 1352), yet he is disabled, *ex defectu natalium*, from bequeathing by testament, without letters of legitimation from the Sovereign (*Comm. of Berwickshire v. Craw*, June 18, 1678, M. 1351).(e) If the bastard has lawful children, he may test without such letters, and name tutors and curators to his issue (*Muir & Thomson v. Kincaid*, March 8, 1628, M. 1349), for in such case the King can have no interest to object, the bastard's children being his lawful heirs. Letters of legitimation, let their causes be ever so strong, cannot enable the bastard to succeed to his natural father to the exclusion of lawful heirs; for the King cannot by any prerogative cut off the private right of third parties. But he may by a special clause in letters of legitimation renounce his right to the bastard's succession, failing his descendants, in favour of him who would have been the bastard's heir had he been born in lawful marriage, seeing such renunciation encroaches upon no right competent to any third party (*Ramsay v. Gowdie*, 1758, M. 1359).

Bastards cannot test without letters of legitimation,

unless they have lawful issue.

Effects of letters of legitimation.

4. The legal rights of succession, being founded in marriage, can be claimed only by those who are born in lawful marriage; the issue, therefore, of an unlawful marriage are incapable of succession. Marriage entered into after divorce for adultery, between the persons guilty, is declared unlawful, and their issue incapable of succeeding, by 1600, c. 20.(g) A bastard is not only excluded—(1.) from his father's succession, because law knows no father who is not marked out by marriage; and (2.) from all heritable succession, whether by

Impediments to succession.

(8, 9)

Bastards incapable of legal succession;

(d) Although, under 18 Vict. c. 23, § 4, there is given to a mother a limited right of succession to her children, this does not apply to the case of her illegitimate issue.

(e) This is altered, and power is given to bastards domiciled in Scotland to dispose of their estates by testament (6 Will. IV. c. 22).

(g) See above, b. i. t. vi. § 23.

the father or mother; because he cannot be pronounced lawful heir by the inquest, in terms of the brief; but also (3.) from the moveable succession of his mother; for though the mother be known, the bastard is not her lawful child, and legitimacy is implied in all succession deferred by law. And if a bastard might be decerned executor as next of kin to his mother, he would, by consequence, be entitled to an equal share of her moveable succession with any of her lawful children. A bastard, though he cannot succeed *jure sanguinis*, may succeed by destination, where he is specially called to the succession by an entail or testament.

but not of  
succession by  
destination.

Are excom-  
municated  
persons in-  
capable of  
succession?

(9, 10)

Aliens cannot  
succeed in  
feudal rights,

nor Papists.

5. Certain persons, though born in lawful marriage, are declared incapable of succession by statute. The director of the chancery was, by 1609, c. 4, prohibited to issue precepts on retours in favour of persons excommunicated; and subject-supérieurs were left at liberty to refuse briefs and precepts of *clare constat* in their favour; but these penalties are now taken off by 1690, c. 28. Aliens are, from their allegiance to a foreign prince, incapable of succeeding in feudal rights without naturalisation (*Leslie v. Forbes*, 1749, M. 4636; see 1558, c. 65, 66; 1669, c. 7). That part of these statutes which supposes them also incapable of moveable succession, though it obtains at this day in some other countries, is not in force with us. Children born in a foreign state, whose fathers were natural-born subjects and not attainted, are declared natural-born subjects by 4 Geo. II. c. 21.(h) Persons educated in or professing the Popish religion, if they shall neglect upon their attaining the age of fifteen to renounce its doctrines by signed declaration, cannot succeed in heritage, but must give place to the next Protestant heir, who will hold the estate irredeemably if the Popish heir does not within ten years after incurring the irritancy sign the *formula* prescribed by the statute (1703, c. 3.)(i)

(h) *Vide supra*, b. ii. t. iii. The Acts 33 Vict. c. 14, and 33 & 34 Vict. c. 102, gave aliens power to take by succession, or otherwise acquire and transmit real and personal property of every description.

(i) Roman Catholics are now relieved from all disabilities (10 Geo. IV. c. 7, § 23; *Earl of Perth*, March 11, 1869, 7 Macph. 642).

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 BOOK IV.(a)
 

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## TIT. I.—OF ACTIONS.

1. Hitherto of persons and rights, the two first objects of Actions, law ; actions are its third object, whereby persons make their rights effectual. An action may be defined, a demand regularly made and insisted in before the judge competent, for the attaining or recovering of a right ; and it suffers several divisions, according to the different natures of the rights pursued upon. (2)

2. Actions are either *real* or *personal*. A *real* action is <sup>real and</sup> ~~personal~~ that which arises from a right in the thing itself, and which therefore may be directed against all possessors of that thing. Thus, an action for the recovery even of a moveable subject, when founded on a *jus in re*, is, in the proper acceptation, real ; but real actions are, in vulgar speech, confined to such as are directed against heritable subjects. A *personal* action is founded only on an obligation undertaken for the performance of some fact, or the delivery of some subject ; and therefore can be carried on against no other than the person obliged, or his heirs. Both rights are included in an infeftment of annualrent, which contains not only a personal obligation on the granter to pay, but a right of hypothec in the subject itself ; and therefore the creditor can (10)

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(a) The changes in some of the branches of law treated of in this Book have been so great that it is almost impossible fully to adapt it to the present state of the law. Some of the most important alterations have been pointed out in the foot-notes, and in the notes at the end of the Book ; but for details of the new Procedure Acts, and for the full development of the law of Evidence, Crime, &c., in the decisions of the Court, it is necessary to refer to the statutes themselves, and to the works of Mr. Dickson, Mr. Macdonald, and others.

either sue the grantor or his representatives in a personal action; or he may for his payment insist in a real action of poinding the ground against the possessors of the subject affected, though they should not represent the grantor (ii. 8, § 15).

Poinding of  
the ground;

(11)

to whom  
competent.

Against what  
goods is it  
directed?

(13)

3. Poinding of the ground, though it be properly a diligence or an execution, is generally considered by lawyers as a species of real action; and is so called to distinguish it from personal poinding, which is founded merely on an obligation to pay. Every *debitum fundi*, whether legal or conventional, is a foundation for this action.<sup>(b)</sup> It is therefore competent to an annualrenter, for the interest due upon his right; to a superior for his feu-duties, or for his non-entry duties before citation in a declarator, according to the distinction laid down (ii. 5, § 19); and, in general, to all creditors in debts which make a real burden on lands. As it proceeds on a real right, it may be directed against all goods that can be found on the lands burdened, even though the original debtor should be divested of the property in favour of a singular successor. But (1.) goods brought upon the ground by strangers are not subject to this diligence (*Collet v. Master of Balmerinloch*, Feb. 6, 1679, M. 10,550). (2.) Even the goods of a tenant cannot be poinded for more than his term's rent, by 1469, c. 37; *i.e.*, as practice has explained it, for more than the tenant was *de facto* owing to his master

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(b) "As the heritable creditor's right is not a hypothec over the moveables, but a mere right to acquire by diligence a preference over them, it may be doubted whether the doctrine laid down in *Tullis v. White*, June 18, 1817, F.C., was not too unqualified. For there the Court held 'that the right of annualrent gave a real lien on the lands, and a preferable security in the effects that were to be found on the lands, for payment of the annualrents due.' In *Hay v. Marshall*, July 7, 1824, F.C., and *Campbell v. Paul*, Jan. 13, 1835, 13 S. 237, the true principle was brought out, with its limitations."—MOIR. "The right conferred by force of the heritable security seems properly to be a power to attach and distrain the moveables, so long as they remain on the ground not completely transferred, or affected only by inchoate diligence. And this poinding affects not only the moveables on the ground belonging to the landlord, but also the moveables belonging to the tenants, to the extent of all arrears of rent, and current rents" (Bell's Com. i. 59).

of past rents at the time of pointing (*Lady Pitfoddels v. L. Pitfoddels*, Feb. 4, 1674, M. 10,548.)(c)

4. In a pointing of the ground, not only the natural possessors must be cited, but the proprietor of the ground, who has an obvious interest in the issue of the cause. Where, therefore, the action is brought against lands that are granted in wadset, the wadsetter must be cited, who is really the proprietor, and not the reverser, who has the bare right of redemption. The defenders in this action are made parties, not as debtors to the pursuer, but as proprietors or possessors of the lands affected, because the process, being founded on a real right, affects the lands themselves. A decree, therefore, when it is once obtained upon it, operates against all singular successors in the lands, without any new sentence (*Adamson v. L. Balmerino*, June 26, 1662, M. 3346). Whereas in personal pointing the goods are not pointed as being on the ground of any special lands, but as the goods of the pursuer's debtor; and therefore the warrant cannot extend against the goods of any other than the debtor.(d)

5. Actions are either ordinary or rescissory. All actions are in the sense of this division ordinary which are not rescissory. Rescissory actions are divided (1.) into actions of proper improbation; (2.) actions of reduction-improbation; (3.) actions of simple reduction. Proper improbations, which are brought for declaring writings false or forged, are treated of below (iv. 4, § 34 *et seq.*). Reduction-improbation

(c) Pointing of the ground is not competent to proprietors or possessors. The proper process competent to such for the recovery of their rents is the action of maills and duties (Inst. l. c). The process is competent before the sheriff, and extract of his decree is a sufficient warrant to point (*Kennedy v. Buick*, Feb. 17, 1852, 14 D. 513; 1 & 2 Vict. c. 114, § 9; *M. Ailsa v. Jeffrey*, Feb. 15, 1859, 21 D. 492).

(d) In competition with the trustee in a sequestration, no pointing of the ground not carried into effect by sale of the effects sixty days before the sequestration, has any effect, except to the extent of the interest on the debt for the current term, and arrears of interest for one year immediately preceding. To that effect a creditor holding a preferable heritable security may point even after the sequestration (19 & 20 Vict. c. 79, § 118).

Certification

is an action whereby a person who may be hurt or affected by a writing insists for producing or exhibiting it in Court, in order to have it set aside, or its effect ascertained, under the certification that the writing, if not produced, shall be declared false and forged. This certification is a fiction of law, introduced that the production of writings may be the more effectually forced; and therefore it operates only in favour of the pursuer; so that the writing, though declared false, continues in full strength in all questions with third parties. Because the summons in this action proceeds on alleged grounds of falsehood, his Majesty's Advocate, who is the public prosecutor of crimes, must concur in it.(e)

may be  
founded either  
in a real  
interest,

(20)

or a personal.

6. This action may be founded either upon a real interest or a personal. A proprietor of lands has a real interest to reduce all deeds affecting his estate. And though a pursuer's interest, in consequence of his property, appears to be equally strong whether the deeds in question flow from his author or not, yet by our practice hitherto no writings can be called for in this process but those which have been granted by persons with whom the pursuer connects a title (*Stair*, iv. 20, § 14; *L. Innercauld v. E. Aboyne*, Dec. 16, 1709, M. 6659). By our older forms, one whose right to lands was merely personal could not call for seisins of these lands in order to reduction; but now he may if they be granted by his author (*Keith v. L. Braco*, Jan. 24, 1739, M. 6662). Where the writings called for were not granted to the defender himself, but conveyed to him under singular titles, the pursuer was formerly obliged to cite the defender's authors, who were liable to their disponent in warrandice; but, to prevent unnecessary delays, defenders are by the present practice obliged to cite their own authors (Act S., Feb. 16, 1723). A reduction-improbation is founded on a personal interest when one insists for certification against deeds granted by himself, or by any of his ancestors whom he represents by service; but this is not competent to an apparent heir, because he can have no interest till he be served.(f)

(e) This is now unnecessary (31 & 32 Vict. c. 100, § 17).

(f) Mere apparenay used to be a sufficient title to pursue reductions on the head of deathbed (see above, t. viii., § 48), or of a sale of an

7. As the certification in this process draws after it so heavy consequences, three successive terms were by the former custom assigned to the defenders for production, which are reduced to two by 1672, c. 16, § 25, concerning the session. After the second term is elapsed, intimation must be made judicially to the defender to satisfy the production within ten days; and till these are expired no certification can be pronounced (Act S., Jan. 1, 1709.)<sup>(g)</sup> Certification cannot pass against deeds recorded in the Books of Session if the defender shall before the second term offer a condescendence of the dates of their registration, they being considered as already in the hands of the Clerk of Court; and even thereafter, an extract of a deed so recorded will stop certification against the original unless falsehood be objected, in which case the original must be brought from the record to the Court. Extracts of charters from the chancery cannot stop certification; for as no charters are recorded there after sealing, that record proves not the existence of a sealed charter.<sup>(h)</sup> No extract from an inferior court is a bar to certification; the principal

Terms assigned for production.

(21)

Can certification pass against writing in public custody?

(22)

estate by a preceding heir contrary to the fetters of an entail (*Grahame v. Grahame*, Dec. 11, 1829, 8 S. 231). Reductions are incompetent in the Sheriff-Court. By 19 & 20 Vict. c. 79, § 10, "all alienations of property by a party insolvent, or notour bankrupt, which are voidable by statute or at common law, may be set aside either by action or exception," in the Sheriff-Court as well as in the Supreme Court. This does not render competent a proper action of reduction in the Sheriff-Court, but merely enables the validity of a deed to be determined in any proceedings in which it may be founded on, without the necessity of a reduction in the Supreme Court (*Dickson v. Murray*, June 7, 1866, 4 Macph. 797; *Moroney & Co. v. Muir & Sons*, Nov. 5, 1867, 6 Macph. 7).

(g) This procedure was abolished by 50 Geo. III. c. 112, § 9. As to the present procedure as to satisfying production in reductions, see A. S., July 11, 1828, § 51; 13 & 14 Vict. c. 36, § 7; 31 & 32 Vict. c. 100, § 22. In reductions the defender may state objections to the title to sue or plead on an exclusive title, or state other objections to satisfying productions in defences confined to these points in the first instance. If these defences are repelled, he may afterwards lodge defences on the merits (13 & 14 Vict. c. 36, § 7; *United College of St. Andrews v. Blyth*, March 4, 1864, 2 Macph. 810).

(h) Sealing is not now required (31 & 32 Vict. c. 101, § 78).

writing must be laid before the Court of Session on a proper warrant.<sup>(i)</sup>

Simple  
reduction.

(24)

8. In an action for simple reduction the certification is only temporary, declaring the writings called for null until they be produced; so that they recover their full force after production, even against the pursuer himself; for which reason the process is now seldom used. Because its certification is not so severe as in reduction-improbation, there is but one term assigned to the defender for producing the deed called for.<sup>(j)</sup>

Grounds of  
reduction.

9. The most usual grounds of reduction of writings are the want of the requisite solemnities (iii. 2, § 3); or that the grantor was minor (i. 7, § 19); or interdicted (i. 7, § 34); or inhibited (ii. 2, § 2); or that he signed the deed on death-bed<sup>(k)</sup> (iii. 8, § 46); or was compelled or frightened into it or was circumvented; or that he granted it in prejudice of his lawful creditors.

Reduction  
upon force or  
fear, or circum-  
vention,

(25)

10. In reductions on the head of force or fear, or fraud and circumvention, the pursuer must libel the particular circumstances from which his allegation is to be proved and though not any one of them should be relevant or sufficient by itself, they may, when joined together, be sufficient to reduce the deed. Where, therefore, there is the least appearance of relevancy, the Court is in use, before answering, *i.e.*, before pronouncing any interlocutor upon the relevancy of the circumstances libelled—to allow a conjunct proof to both parties as to the manner of granting the deed.<sup>(l)</sup> Re

(i) Unless where the defender takes nothing under the decree (*Clay v. Watson*, 1804, M. 12,216). As to reductions of services, see 31 & 32 Vict. c. 101, § 43.

(j) The chief peculiarity of the action of reduction in existing practice is that where the defender desires to object to the pursuer's title to plead an exclusive title or to state other objections to "satisfying production" he may lodge preliminary defences on that point; defences on the merits being required only if the defences to satisfying production are repelled (13 & 14 Vict. c. 36, § 7). If the defender fails to satisfy production a decree of certification *contra non producta* is pronounced. The defender is not required to produce writings which were never in his possession.

(k) This is no longer a ground of reduction (34 & 35 Vict. c. 81).

(l) See *Wardlaw v. M'Kenzie*, June 10, 1859, 21 D. 940. Such actions are now sent to a jury.

duction is not competent upon every degree of force or fear; it must be such as would shake a man of constancy and resolution. Neither is it competent on that fear which arises from the just authority of husbands or parents over their wives or children (l. 21, 22, *de rit. nupt.*, D. 23, 2); nor of magistrates over those subjected to them (l. 3, § 1, *quod met. causd.*, D. 4, 2); nor upon the fear arising from the regular execution of lawful diligence by caption, provided the deeds granted under that fear relate to the ground of debt contained in the diligence (*Mair v. Stewart*, Jan. 22, 1667, M. 16,484); but if they have no relation to that debt, they are reducible *ex metu* (*Heriot v. Bird*, 1681, M. 16,496).<sup>(n)</sup>

11. Where a person of a weak or facile temper executes a deed in itself irrational, the most slender circumstances of fraud on the part of the receiver will be laid hold of to set it aside. But without some such circumstance the deed must stand; for let a person be ever so subject to imposition, if he is not fatuous or legally interdicted, his deeds are effectual unless they have been drawn from him by unfair practices.<sup>(o)</sup> Yet where the deed itself discovers oppression, or a catching an undue advantage from the necessities of our neighbour, dolo is said *inesse in re*, and so requires no extrinsic proof. Thus, a bond taken from an heir for quadruple the sum lent, though payable only in the event that he should succeed to his ancestor, was reduced except as to the principal sum really advanced, and its interest (*Abercromby v. E. Peterborough*, July 13, 1745, M. 4894).

12. The reduction of alienations hurtful to creditors is founded upon the Act 1621, c. 18,<sup>(p)</sup> which we have borrowed from the Roman law (l. 1 *et seq.*, *quæ in fraud. cred.*, 42, 8). By the first part of this statute all alienations granted after contracting of lawful debts, in favour of conjunct or confident persons, without true, just, and necessary causes, and without a just price really paid, are declared null. One is deemed

not competent on every degree of force or fear;

(26)

nor on the grantor's facility per se.

(27)

Reduction upon the Act 1621.

(28-29)

First part of the Act.

Who are deemed prior creditors;

(30)

(n) *Dick v. Gutzmer*, Nov. 28, 1829, 8 S. 147; *Craig v. Paton*, Dec. 13, 1865, 4 Macph. 192.

(o) See *Clunie v. Stirling*, March 11, 1852, 17 D. 15.

(p) See a commentary on this statute and that of 1696 in Note A, at the end of this title, superseding foot-notes.

conjunct or  
confident  
persons.

(31)

a prior creditor whose ground of debt existed before the right granted by the debtor, though the written voucher of the debt should bear a date posterior to it (*Cred. of Pollock v. Pollock*, Jan. 21, 1669, M. 1002; *Street v. Masson and L. Torphichen*, July 27, 1669, M. 1003). Persons are accounted conjunct whose relations to the granter is so near as to bar them from judging in his cause (*Lord Elibank v. Callander*, Feb. 8, 1712, M. 12,569). Confident persons are those who appear to be in the granter's confidence, by being employed in his affairs or about his person; as a doer, steward, or domestic servant.(q)

Gratuitous  
deeds are  
reducible,

(32)

if the granter  
was insolvent.

Provisions to  
children are  
gratuitous;  
(34)

but not settle-  
ments to wives.

(33)

13. Though by the letter of this Act the right to be reduced must be granted both without a price paid and in favour of a conjunct or confident person, yet by practice gratuitous rights, even where they are granted to strangers, are subject to reduction. But rights, though gratuitous, are not reducible if the granter had at the date thereof a sufficient fund for the payment of his creditors (*Clark v. Stewart & Watson*, 1675, M. 917; *Meldrum's Execrs. v. Meldrum*, 1717, M. 928). Provisions to children are in the judgment of law gratuitous; so that their effect in a question with creditors depends on the solvency of the granter. But settlements to wives, either in marriage-contracts (*Cra. of Thoirs v. Lady Middleton*, Nov. 18, 1729, M. 984) or even after marriage, are onerous in so far as they are rational; and consequently are not reducible even though the granter was insolvent (*Robertson v. Handyside*, Jan. 11, 1738, M. 957; *Sir R. Mackenzie v. Monro*, Feb. 17, 1728, M. 958). This rule holds also in rational tochers contracted to husbands (*Lockhart v. Dundas*, Jan. 22, 1714, M. 956). But it must in all cases be qualified with this limitation—if the insolvency of the granter was not publicly known; for if it was, fraud is presumed in the receiver of the right, by contracting with the bankrupt (*Wood v. Reid*, Nov. 23, 1680, M. 977.)

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(q) *Edmond v. Grant*, June 1, 1853, 15 D. 703. Whether a testamentary trustee or tutor is a confident person in regard to a beneficiary or pupil is a question of circumstances (see *Young v. Danoch's Trs.*, Jan. 23, 1835, 13 S. 305; *Laing v. Cheyne*, Jan. 18, 1832, 10 S. 202).

14. The creditor who objects to the deed must by the words of the Act prove that it was gratuitous, either by the oath or writing of the receiver; but as the statute is now explained, the receiver, if he be a conjunct or confident person, must astruct or support the onerous cause of his right, not merely by his own oath, but by some circumstances or adminicles (*Duff & Brown v. Forbes*, Dec. 15, 1671, M. 12,428). If there is no real ground of suspicion, the slightest adminicles will serve (*Skene v. Forbes*, M. 12,572). Where a right is granted to a stranger, the narrative of it, expressing an onerous cause, is sufficient *per se* to secure it against reduction (*Trotter v. Hume*, June 26, 1680, M. 12,561).

On whom  
does the proof  
lie?

(35)

15. By a second branch of this statute all voluntary *payments* or rights made by a bankrupt to one creditor, to disappoint the more timeous diligence of another, are reducible at the instance of that creditor who has used the prior diligence. Grants made by the debtor in consideration of sums instantly advanced by the grantee are not securities given to creditors, and so fall not under the sanction of the statute—*e.g.*, a sale of lands (*Neilson v. Ross*, Feb. 8, 1681, M. 1045), or a bond of borrowed money (*Monteith v. Anderson*, June 18, 1665, M. 1044). A creditor, though his diligence be but begun by citation, may insist in a reduction of all posterior voluntary rights granted to his prejudice (*Gartshore v. Cockburn*, 1686, M. 1051; *Brown v. Bruce's Crs.*, Jan. 9, 1696, M. 1055); but the creditor who neglects to complete his begun diligence within a reasonable time is not entitled to reduce any right granted by the debtor after the time that the diligence is considered as abandoned (*Drummond v. Kennedy*, July 9, 1709, M. 1079).

Second branch  
of the Act.

(37, 40)

What is meant  
by prior  
diligence.

16. A prohibited alienation, when conveyed by the receiver to another who is not privy to the fraud, subsists by the statute in the person of the *bond fide* purchaser. Where the conjunction or confidence between the granter and receiver cannot be perceived, either from the tenor of the right or from the conveyance of it to the purchaser, the purchaser is not presumed to have been partaker of the fraud (*Allan v. Thomson*, Jan. 9, 1730, M. 1022). This

Reduction not  
good against  
singular  
successors.

(40)

Nullity, when  
receivable by  
exception.

statute declares all alienations made contrary thereto to be null, either by way of action or exception. But in practice it is only in the case of moveable rights that the nullity is receivable by exception (*Bower v. Couper*, June 16, 1671, M. 2734); it must be declared by reduction where the right is heritable (*L. Lour v. Lady Craig*, July 22, 1664, M. 2733).(r)

Reduction  
upon the Act  
1696.

(41, 42)

17. By Act 1696, c. 5, all alienations by a bankrupt within sixty days before his bankruptcy to one creditor in preference to another, are reducible at the instance even of such co-creditors as had not used the least step of diligence. —A bankrupt is there described by the following characters: diligence used against him by horning and caption; and insolvency, joined either with imprisonment, retiring to the sanctuary, absconding, or forcibly defending himself from diligence. It is sufficient that a caption is raised against the debtor, though it be not executed, provided he has retired to shun it (*Lord Kilkerran v. Couper*, Feb. 24, 1737, M. 1091). It is provided that all heritable bonds or rights on which seisin may follow, shall be reckoned, in a question with the granter's other creditors upon this Act, to be of the date of the seisin following thereon,(s) and it has been variously decided, whether heritable bonds, granted in security of debts presently contracted, fall under this branch of the statute; but by the last decision (*Johnston v. Home*, 1751, M. 1130) the Act was found to relate only to securities for former debts, and not to *nova debita*.

Trust-right, if  
reducible.

(45)

18. Rights granted by a debtor in trust for his creditors, though they should contain no partial clause preferring any one creditor before the rest, were formerly set aside at the suit of those creditors who did not accede to them; because

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(r) In practice it came to be held, contrary to the express words of the Act, that the challenge must be by action only; but this is altered by §§ 9 & 10 of the Act of 1856.

(s) By 54 Geo. III. c. 137, §§ 12 & 13, transferences, or other rights which require seisin to their completion, shall be held to be of the date of the registration of the seisin (see, now, 31 & 32 Vict. c. 101, § 15), and in all other cases of the date of the intimation, delivery, or other act requisite for completing the same.

the right of creditors to affect their debtor's estate by diligence ought not to be restrained by a deed of the debtor, imposing a trustee on them without their consent (*Snee v. Anderson's Trs.*, July 12, 1734, M. 1206); but now they are sustained if the debtor be not bankrupt in the precise terms of the statute 1696 (*Snodgrass v. Beat's Crs.*, Nov. 13, 1744, M. 1209, 1095; *Grant v. Cunningham*, 1747, M. 1097).(t)

19. Actions are, both by the Roman law and ours, divided into *rei persecutoriæ* and *pœnales*. By the first, the pursuer insists barely to recover what *patrimonio ejus abest*, the subject that is his, or the debt that is due to him; and this includes the damage sustained by the pursuer, *damnum et interesse*; for one is as truly a sufferer in his patrimonial interest by that damage as by the loss of the subject itself. In penal actions, which always arise *ex delicto*, something is also demanded by way of penalty.

Actions either  
rei persecu-  
toria, or penal.  
(14)

20. Actions of spuilzie, ejection, and intrusion are penal. An action of spuilzie is competent to one dispossessed of a moveable subject violently, or without order of law, against the person dispossessing; not only for being restored to the possession of the subject, if extant, or for the value if it be destroyed, but also for the violent profits (as to which see ii. 6, § 24), in case the action be brought within three years from the spoliation. The pursuer need prove no more than that he was in the lawful possession; nay, though the defender should offer to prove himself proprietor, it is no good defence; for he ought not *jus sibi dicere*. But it is a relevant defence that the defender had a probable title for what he did, for *quilibet titulus excusat a spolio*; or that he made voluntary restitution *de recenti* of the goods spuilzied, *cum omni causa*.(v) Ejection and intrusion are in heritable subjects what spuilzie is in moveable. The difference between the two first is, that in ejection violence is used, whereas the intruder enters into the void possession without either a title

Action of  
spuilzie.  
(15)

Ejection and  
intrusion.

(t) In general, such deeds are not now effectual when granted within sixty days of bankruptcy (see Bell's Com. ii. 495, 496).

(v) I.e., as to the penal consequences; for these defences are "utterly ineffectual in so far as concerns simple restitution and damages" (Inst. l. c.).

from the proprietor or the warrant of a judge. The actions arising from all the three are of the same general nature.

Contravention  
of law-  
borrows;  
(16)

its penalty.

21. The action of contravention of law-borrows is also penal. It proceeds on letters of law-borrows (from *borgh*, a cautioner), which contain a warrant to charge the party complained upon, that he may give security not to hurt the complainer in his person, family, or estate (1429, c. 129; 1581, c. 117).<sup>(w)</sup> These letters do not require the previous citation of the party complained upon, because the caution which the law requires is only for doing what is every man's duty; but before the letters are executed against him the complainer must make oath that he dreads bodily harm from him.<sup>(x)</sup> The penalty of contravention is ascertained to a special sum, according to the offender's quality, the half to be applied to the fisk,<sup>(y)</sup> and the half to the complainer (1593, c. 166); which may be demanded though the person complained upon should not have given caution in obedience to the letters (1597, c. 269). Contravention is not incurred by the uttering of reproachful words, where they are not accompanied either with acts of violence, or at least a real injury; and, as the action is penal, it is elided by any probable ground of excuse.<sup>(z)</sup>

Penal actions  
not trans-  
missible  
against heirs.

(14, 70)

Exception to  
this rule.

22. Penalties are the consequences of delict, or transgression; and as no heir ought to be accountable for the delict of his ancestor farther than the injured person has really suffered by it, penal actions die with the delinquent, and are not transmissible against heirs. Yet the action, if it has been commenced and litiscontested in the delinquent's

<sup>(w)</sup> See A. S., Jan. 21, 1595.

<sup>(x)</sup> In cases between husband and wife, or parent and child, the complainer must bring some evidence that he has cause to dread bodily harm (*Taylor*, June 25, 1829, 7 S. 794; *Thomson*, March 7, 1815, F.C.; *Calder*, Feb. 24, 1841, 3 D. 615).

<sup>(y)</sup> Hence the Lord Advocate must be a pursuer on behalf of the Crown.

<sup>(z)</sup> The warrant may be brought under review by suspension, or suspension and liberation, if imprisonment has followed on failure to find caution. It has been held that it is necessary to prove malice and want of probable cause before the warrant will be quashed; but this seems too strict (*Randall v. Johnstone*, June 28, 1868, 40 Jur. 554).

lifetime, may be continued against the heir though the delinquent should die during the dependence; as to which see § 40. Some actions are *rei persecutoriæ* on the part of the pursuer, when he insists for simple restitution, which yet may be penal in respect of the defender—*e.g.*, the action on the passive title of vitious intromission, by which the pursuer frequently recovers the whole debt due to him by the deceased, though it should exceed the value of the goods intermeddled with by the defenders.

23. The most celebrated division of actions in our law is into *petitory*, *possessory*, and *declaratory*. *Petitory* actions are those where something is demanded from the defender in consequence of a right of property or of credit in the pursuer; thus, actions for restitution of moveables, actions of pouncing, of forthcoming, and indeed all personal actions upon contracts, or *quasi*-contracts, are petitory. *Possessory* actions are those which are founded either upon possession alone, as spuilzies, or upon possession joined with another title, as removings (ii. 6, § 23), and they are competent either for getting into possession, for holding it, or for recovering it; analogous to the interdicts of the Roman law, *quorum bonorum*, *uti possidetis*, and *unde vi*. The nature and privileges of possession have been already explained (ii. 1, § 12 *et seq.*).

24. An action of molestation is a possessory action competent to the proprietor of a land-estate against those who disturb his possession. It is chiefly used in questions of commonry, or of controverted marches. Where it is pursued before the session, the Judges are (by 1587, c. 42, ratifying an Act of Sederunt) ordained to remit the cause to the sheriff of the county where the lands lie; who is empowered to take cognition of the marches, and to put the facts contained in the libel and defences to the knowledge of an inquest, consisting of persons dwelling in the parish, most of them landed men: but this is now seldom practised; for the Court ordinarily allow a proof to be brought before themselves, and give judgment thereupon. Where a declarator of property is conjoined with a process of molestation, the session alone is competent to the action. Actions on brieves of perambula-

Actions,  
petitory;  
(47)

possessory.

Action of  
molestation.  
(48)

Brief of perambulation.

tion (1579, c. 79) have the same tendency with molestations—viz., the settling of marches between conterminous lands. The difference commonly stated between the two is, that the first sort is founded solely on a right of property, and so is petitory; whereas, in molestations, the pursuer founds also on his possession.<sup>(a)</sup>

Action of mails and duties.

(49)

25. The action of mails and duties is sometimes petitory and sometimes possessory. In either case it is directed against the tenants and natural possessors of land-estates, for payment to the pursuer of the rents remaining due by them for past crops, and of the full rent for the future. It is competent, not only to a proprietor whose right is perfected by seisin, but to a simple disponee; for a disposition of lands includes a right to the mails and duties; and consequently to an adjudger; for an adjudication is a judicial disposition.<sup>(b)</sup>

Petitory.

In the petitory action, the pursuer, since he founds upon right, not possession, must make the proprietor, from whom the tenants derive their right, party to the suit; and he must support his claim by titles of property or diligences, preferable to those in the person of his competitor. In the possessory, the pursuer who libels that he, his ancestors, or authors, have been seven years in possession, and that therefore he has the benefit of a possessory judgment, need produce no other title than a seisin, which is a title sufficient to make the possession of heritage lawful; and it is enough if he calls the natural possessors, though he should neglect the proprietor (Stair, iv. 32, § 13 *et seq.*). A possessory judgment founded on seven years' possession, in consequence

A possessory judgment.

(50)

either of a seisin or a tack,<sup>(c)</sup> has this effect, that though one should claim under a title preferable to that of the possessor, he cannot compete with him in the possession till, in a formal process of reduction, he shall obtain the possessor's title to be declared void (Stair, iv. 26. 3).

(a) These possessory actions are practically superseded by the process of interdict, with which, however, they are sometimes combined.

(b) And to a creditor in an heritable bond (*Davidson*, Nov. 28, 1839, 12 Jur. 211).

(c) Any written title seems sufficient (*Knox v. Brand*, May 26, 1827, 5 S. 714); but there must be a written title (*Neilson v. Vallance*, Dec. 10, 1828, 7 S. 182; *Dickson v. Dickie*, July 18, 1863, 1 Macph. 1157).

26. A declaratory action is that in which some right is craved to be declared in favour of the pursuer, but nothing sought to be paid or performed by the defender,<sup>(d)</sup> such as declarators of marriage, of irritancy, of expiry of the legal, reversion, actions competent to superiors or their donatories for declaring casualties incurred by vassals, &c. Under this class may be also comprehended rescissory actions, which, without any personal conclusion against the defender, tend simply to set aside the rights or writings libelled; in consequence of which, a contrary right or immunity arises to the pursuer. Declarators of property are now seldom used; because rights affecting property are more effectually forced into the field by the action of reduction-improbation, which has always a declaratory conclusion subjoined to it. Decreases upon actions that are properly declaratory confer no new right; they only declare what was the pursuer's right before, and so have a retrospect to the period at which that right commenced, as in declarators of liferent escheat (ii. 5, § 33); but this character is not applicable to most of our declaratory decrees. Declarators, because they have no personal conclusion against the defender, may be pursued against an apparent heir without a previous charge given him to enter to his ancestor, unless where special circumstances require a charge.

Declaratory actions;

(46)

their properties.

27. An action for proving the tenor, whereby a writing which is destroyed or amissing is endeavoured to be revived, is in effect declaratory. In obligations that are extinguishable barely by the debtor's retiring or cancelling them, the pursuer, before a proof of the tenor is admitted, must condescend on such a *casus amissionis*, or accident by which the writing was destroyed, as shows it was lost when in the creditor's possession; otherwise, bonds that have been cancelled by the debtor on payment might be reared up as still subsisting against him.<sup>(e)</sup> But in writings which require con-

Proving the tenor.

(54)

*Casus amissionis.*

(d) Petitory conclusions are often combined with declaratory, the former being ancillary to the latter—success in the petitory conclusions being dependent on success in the declaratory.

(e) *Winchester v. Smith*, March 20, 1863, 1 Macph. 685. This rule is specially applicable in the case of bills (*Campbell v. York Buildings Co.*,

trary deeds to extinguish their effect, as assignments, dispositions, charters, &c., it is sufficient to libel that they were lost, and how, even *casu fortuito* (Stair iv. 32. 3, 4). (f)

Adminicles in writing,

(55. 56)

28. Regularly no deed can be revived by this action without some adminicle in writing—i.e., without some collateral deed referring to that which is libelled; for no written obligation ought to be raised up barely on the testimony of witnesses: yet where one's whole writings have been destroyed by fire, or in other such special cases which call for an extraordinary remedy, a proof of the tenor may be admitted without any such adminicle (Stair, *ibid.*). If these adminicles afford sufficient conviction that the deed libelled did once exist, the tenor is admitted to be proved by witnesses, who must depose either that they were present at signing the deed or that they afterwards saw it duly subscribed. Where the relative writings contain all the substantial clauses of that which is lost, the tenor is sometimes sustained without witnesses (*Inglis v. Charteris*, June 26, 1712, M. 2744). (g) In a writing which is libelled to have contained uncommon clauses, all these must appear by the adminicles; otherwise the right might be again brought to life of a quite different nature from that which was lost.

sometimes sufficient per se.

Can the tenor of all writings be proved?

(58)

29. The tenor of all writings, both voluntary and judicial, may be proved by this action; even decrees of apprising, which of all others require the greatest nicety of form (*Birnie v. Montgomery*, 1675, M. 15,796). By Act 1579, c. 94, the tenor of letters of horning and execution thereof, which have not been judicially produced, cannot be proved by witnesses; but this statute does not seem to extend to the case of horning supported by written adminicles. Actions of

1780, M. 15,828; *Carson v. M'Micken*, May 14, 1811, F.C.; *M'Farlane v. M'Nee*, March 1, 1826, 4 S. 503). In the case of testamentary writings, a *casus amissionis* must be libelled incompatible with the idea that the testator intentionally cancelled or destroyed the deed (*Dow v. Dow*, June 30, 1848, 10 D. 1465).

(f) See *Winchester*, *supra*.

(g) Except in special circumstances, as when the writing is of old date, or is only a step in a progress of writings, this holds true only when the adminicles are probative writings under the hand of the granter of the last deed, or his successors (see *Dickson on Evid.* 1308).

proving the tenor are, on account of their importance, appropriated to the Court of Session; and by the old form the testimony of the witnesses could not be received but in the presence of all the judges.

30. The action of double or multiplepounding may be also reckoned declaratory. It is competent to a debtor who is distressed or threatened with distress by two or more persons claiming right to the debt, and who therefore brings the several claimants into the field, in order to the debating and settling their several preferences, that so he may pay securely to him whose right shall be found preferable. This action is daily pursued by an arrestee, in the case of several arrestments used in his hands for the same debt, or by tenants, in the case of several adjudgers, all of whom claim right to the same rents.<sup>(h)</sup> In these competitions any of the competitors may bring an action of multiplepounding in name of the tenants or other debtors, without their consent, or even though they should disclaim the process; since the law has introduced it as the proper remedy for getting such competitions determined. And while the subject in controversy continues *in medio*, any third person who conceives he has right to it may, though he should not be cited as a defender, produce his titles as if he were an original party to the suit, and will be admitted for his interest in the competition.<sup>(i)</sup>

Multiplepounding,

(iv. 3, 23)

may be pursued by any having interest, though the debtor disclaim.

31. Certain actions may be called *accessory*, because they are merely preparatory or subservient to other actions. Thus, exhibitions *ad deliberandum* (iii. 8, § 27) are intended only

Accessory actions.

(52)

Exhibitions.

(h) Or by trustees, holders of a fund, to determine the mode of its distribution among those entitled to it, and obtain exoneration for themselves. See next note.

(i) Instead of proceeding to litigate in the form previously used, the parties having opposing interests in a multiplepounding may now, when they are agreed on the facts, make their averments in the form of a joint case, appending their claims and pleas (31 & 32 Vict. c. 100, § 30). In many instances this process is now superseded by the simpler expedient of a "special case" on a question of law, setting forth the facts agreed on, and the question of law on which the parties ask the opinion or judgment of the Court (*ib.* § 63).

Incident  
diligence.

to pave the way for future processes.(j) Where a party to a suit was to prove a point by writings which were in the hands of a third person, a separate action was, in our ancient forms, necessary for forcing the exhibition thereof (Stair iv. 41, § 4, 5); but this is now done summarily, by incident diligence granted by warrant of the Court against the havers or possessors of these writings for exhibiting them. The persons cited in this diligence must either produce the writings called for, or depose that they neither have them nor had them since the citation, nor have fraudulently put them out of their custody to elude a future citation, nor suspect by whom they were taken away, nor where they now are (see Act S., Feb. 22, 1688).(k)

Transference.  
(60, 61, 63)

32. An act of *transference* is also of this sort, whereby an action, during the pendency of which the pursuer or defender happens to die, is craved to be transferred from the deceased to his representative in the condition in which it stood formerly. If it be the pursuer who is dead, it was called a transference *active*; if the defender, it is a transference *passive*. Upon the pursuer's death his heir may now, by 1693, c. 15, insist in the cause against the defender, without a transference *active*, upon producing either a retour or a confirmed testament, according as the subject is heritable or moveable. But transferees *passive* continue by that Act on the former footing; it being reasonable upon the death of a defender to give previous notice to his heir, before he be obliged to defend in a process, of which perhaps he knew nothing before.(l) Transferences being but incidental to other actions, can be pronounced by that inferior judge alone before

Transference  
active now  
unnecessary.

What judges  
can transfer.

(j) But an action of exhibition, grounded on a right of property in the deeds libelled, is a principal action, which subsists by itself to the effect of obtaining delivery of the deeds (Inst. l. c.; *Crauford v. Campbell*, Feb. 25, 1824, 2 S. 737, rev. May 26, 1826, 2 W. & S. 440).

(k) A commission and diligence for the examination of havers may be executed in any part of the United Kingdom (6 & 7 Vict. c. 82, § 5). As to Sheriff-courts, see 16 & 17 Vict. c. 80, § 11.

(l) By 31 & 32 Vict. c. 100, § 96, transference is now effected by an interlocutor by the Lord Ordinary or Inner House, proceeding upon a minute lodged in the principal action, and served on the parties against whom the cause is sought to be transferred.

whom the principal cause depended; but where the representatives of the deceased live in another territory, it is the Supreme Court which must transfer (*Denholm v. Johnston*, Jan. 9, 1674, M. 7485).<sup>(n)</sup> By the above-cited statute 1693, obligations may now be registered summarily after the creditor's death; which before was not admitted without a separate process of registration, to which the granter was necessarily to be made a party.

**33.** A process of *wakening* is likewise accessory. An *Wakening*. action is said to sleep when it lies over, not insisted in for a year, in which case its effect is suspended; but even then it may at any time within the years of prescription be revived or awakened by a summons, in which the pursuer recites the last step of the process, and concludes that it may be again carried on as if it had not been discontinued. An action that stands upon any of the Inner-House rolls cannot sleep;<sup>(o)</sup> nor an action in which decree is pronounced, because it has got its full completion. Consequently, the decree may be extracted after the year without the necessity of a *wakening*.<sup>(p)</sup> (62)

**34.** An action of *transumpt* falls under the same class. *Transumpt*, It is competent to those who have a partial interest in writings that are not in their own custody, against the possessors thereof, for exhibiting them, that they may be transumed for their behoof. Though the ordinary title in this process be an obligation by the defender to grant transumps to the pursuer, it is sufficient if the pursuer can show that he has *competent to any having interest*. (53)

(n) Where the representatives reside out of the kingdom, the transference against them is incompetent for want of jurisdiction, and arrestment *ad fundandam jurisdictionem* is not competent against foreign executors till confirmed (*Cameron v. Chapman*, March 9, 1838, 16 S. 907).

(o) Nor jury causes in which issues have been adjusted and signed (A. S., Feb. 11, 1841, § 47).

(p) The Act 31 & 32 Vict. c. 100, § 97, makes it competent for the Lord Ordinary, upon a minute lodged by the party entitled to raise a summons of *wakening*, and served on the parties against whom the action is to be *wakened*, to pronounce an interlocutor holding the cause as *wakened*, and also to transfer the cause against the parties named in the minute.

an interest in the writings ; but in this case he must transume them on his own charges. Actions of transumpt may be pursued before any judge-ordinary. After the writings to be transumed are exhibited, full duplicates are made out, collated, and signed, by one of the clerks of court, which are called *transumps*, and are as effectual as an extract from the register, so that they cannot be defeated but by improbation ; in which case, the user of the transumpt must either produce the principal writings themselves upon a diligence, or otherwise suffer certification to pass against them.(q) Advocations (i. 2, § 20) and suspensions (iv. 3, § 5) are not so properly accessory actions as judicial steps that give a new form to the action to which they relate. Summonses *prævento termino*, which were used for shortening the days of appearance assigned in suspensions or advocations, are now quite in disuse ; for by the present practice a fixed rule is observed with respect to these days ; and no suspension or advocacy passes upon long days, as the custom was formerly.

Summonses  
*prævento*  
*termino*.

Actions  
proceeded  
anciently on  
brieves ;

(3)

now on  
summonses.

(4)

Summonses  
must be now  
libelled.

(5)

35. Actions proceeded anciently upon brieves issuing from the chancery, directed to the justiciary or judge-ordinary, who tried the matter by a jury, upon whose verdict judgment was pronounced. And to this day we retain certain brieves, as of inquest, terce, idiотry, tutory, perambulation, and perhaps two or three others.(r) But summonses were, immediately, upon the institution of the College of Justice, introduced into our law in the place of brieves. A summons, when applied to actions pursued before the session, is a writ in the King's name, issuing from his signet upon the pursuer's complaint, authorising messengers(s) to cite the defender to appear before the Court, and make his defences. Formerly, when a summons passed the signet it contained little more than the pursuer's name and the date of signeting. Before citing the defender upon it, his name and the days of appearance were

(q) Actions of transumpt are now scarcely used (Shand's Prac. 609 ; see *Webster v. Reid's Trs.*, Nov. 24, 1857, 20 D. 83).

(r) See above, b. i. 7. 27 ; i. 7. 4 ; iii. 8. 28, &c.

(s) It may be served by a sheriff-officer when the defender resides in any of the islands or in any district of a county where there is no messenger resident (31 & 32 Vict. c 100, § 9).

filled up in the blank ; but the libel or declaration, setting forth the ground of action, needed not to have been engrossed in it till it was called in Court. By Act S., Feb. 16, 1723, which was but temporary, the libel was ordained to be filled up in summonses before execution, with certain exceptions therein contained ; and this Act is made perpetual by a posterior one (Feb. 19, 1742).(t)

36. The days indulged by law to a defender between his citation and appearance, to prepare for his defence, are called *induciæ legales*. If he is within the kingdom, twenty-one and six days, for the first and second diets of appearance, must be allowed him for that purpose ; and if out of it, sixty and fifteen. Defenders residing in Orkney or Zetland must be cited on forty days (1685, c. 43). In certain summonses which are privileged the *induciæ* are shortened. Spuilzies and ejections proceed on fifteen days (1503, c. 65) ; wakenings and transferences, being but incidental, on six. See the list of privileged summonses in Act S., June 29, 1672.(u) A summons must be executed—*i.e.*, served against the defender—so as the last diet of appearance may be within a year after the date of the summons ; and it must be called within a year after that diet, otherwise it falls for ever. Offences against the authority of the Court, acts of malversation in office by any member of the College of Justice, and acts of violence and oppression committed during the dependence of a suit

*Induciæ  
legales.*

(6)

Privileged  
summons.

(8)

Actions triable  
without  
summons.

(t) By the Judicature Act, 6 Geo. IV. c. 120, the pursuer in all ordinary actions was required to set forth in his summons the nature, extent, and grounds of the complaint or cause of action, and the conclusions which by law he was entitled to deduce therefrom. By 13 & 14 Vict. c. 36, he is bound to set forth in the summons itself his name and designation, the name and designation of the defender, and the conclusions of the action, and to set forth the allegations in fact which form the grounds of action in an articulate condescendence, accompanied by pleas in law, which are held to form part of the summons. The Act 31 & 32 Vict. c. 100, §§ 20 & 29, gives large powers to amend errors or defects.

(u) The *induciæ* of all summonses before the Court of Session is now seven days where the defender is within Scotland, and fourteen days where he is in Orkney and Shetland, or any other island of Scotland (31 & 32 Vict. c. 100, § 14).

by any of the parties may be tried without a summons, by a summary complaint.

Concourse of  
actions.

(64)

37. Different civil actions were by the Roman law frequently competent, on the same ground or right, to the pursuer; who, after he had prevailed in one action, might insist in the other, in so far as it contained more than he had recovered by the first. Our law knows no such concurrence; for where an action is in part penal—*e.g.*, a removing, spuilzie, &c.—a pursuer who restricts his demands to, and obtains decree merely for restitution, cannot thereafter bring a new process for the violent profits. Yet the same fact may be the foundation both of a criminal and civil action; because these two are intended for different purposes: the one for satisfying the public justice, the other for indemnifying the private party. And though the defender should be absolved in the criminal trial for want of evidence by witnesses, the party injured may bring an action *ad civilem effectum*, in which he is entitled to refer the libel to the defender's oath.

Accumulation  
of actions.

(65)

38. Where actions of different kinds were competent, though upon the same ground of right, they could not by the Roman law be included in the same libel (l. 43, § 1, *de reg. jure*, 50, 17); for every different species of action had a particular *formula*, which it behoved the prætor to observe in remitting the cause to the judge. But where one had separate claims against another, all productive of the same sort of action, he might have thrown them into one libel (l. 52, § 14, *pro socio*, 17, 2); because there, as the actions were of the same kind, one *formula* served for all. By our forms one libel may contain different conclusions on the same ground of right, rescissory, declaratory, petitory, &c., if they be not repugnant to each other. Nay, though different sums be due to one upon distinct grounds of debt, or even by different debtors, the creditor may insist against them all in the same summons.(c)

Defences  
dilatory and  
peremptory.

(66-68)

39. Defences are pleas offered by a defender for eliding

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(c) Only six unconnected defences can be called in one summons (A. of S., Nov. 2, 1695, § 28).

an action. They are either dilatory, which do not enter into the cause itself, and so can only procure an absolutor from the *lis pendens*; or peremptory, which entirely cut off the pursuer's right of action (*quæ perimunt causam*). The first, because they relate to the forms of proceeding, must be offered *in limine judicii*, and all of them at once (Act S., Nov. 20, 1711, § 16).<sup>(x)</sup> But peremptory defences may be proponed at any time before sentence (l. 2, *C. sent. resc.*, 7, 50). But with the restriction contained in Act., July 23, 1674.

40. A cause, after the parties had litigated it before the judge, was said by the Romans to be *litiscontested*. By *litiscontestation* a judicial contract is understood to be entered into by the litigants, by which the action is perpetuated against heirs, even when it arises *ex delicto*.<sup>(y)</sup> By our law *litiscontestation* is not formed till an act is extracted, admitting the libel or defences to proof (*Stuart v. E. Bute*, Feb. 7, 1712, M. 10,351).<sup>(z)</sup>

## NOTE A.

## BANKRUPTCY.

"Insolvency in its simplest form consists in the bankrupt's inability to pay his debts in full. 'More particularly,' adds Mr. Bell, 'he is insolvent when the engagements which he is unable to answer are so numerous or so great in amount that he cannot proceed without the aid of some general arrangement with his creditors; some indulgence given in point of time; some consent that his payments shall be taken in small portions. A person in that state is truly insolvent, and it does not follow that he is not

Definition of  
insolvency.

(x) In all ordinary actions defences both peremptory and dilatory must be stated at once (6 Geo. IV. c. 120, § 2). But great facilities for amendment have been given by 31 & 32 Vict. c. 100, § 29.

(y) A right to recover damages transmits against heirs even without *litiscontestation* (*Morrison v. Cameron*, May 25, 1809, F.C.). If the claim, however, is for a penalty, it does not transmit without *litiscontestation* (*M'Turk v. Greig*, July 2, 1830, 8 S. 995).

(z) It would probably be held under our present practice that *litiscontestation* takes place to this effect when defences on the merits are lodged.

As to litigiousity in regard to lands, see 31 & 32 Vict. c. 101, § 159.

insolvent because in the end his affairs may come round and he may ultimately have a surplus on winding them up. Public insolvency or notour bankruptcy is designated by certain public acts of legal diligence, indicating to the world the bankrupt condition of the debtor, and disabling him within a certain period from doing anything which may confer a preference on favoured creditors.' ”

“The proof of insolvency must consist in a comparison of funds with obligations ; if the obligations exceed the funds when fairly valued, the debtor is insolvent ; and in challenging deeds granted by the insolvent debtor, whether under the statutes or at common law, insolvency is to be computed as at the point of time when the act that is challenged as incompetent was done.”

Preferences by insolvent debtors, how far reducible at common law.

“Where a debtor feels himself to be insolvent, he has a natural tendency to protect his friends and relatives at the expense of his other creditors, and the Legislature, coming in aid of the common law, has interfered by the statutes 1621, c. 18, and 1696, c. 5, to cut down such preferences, and, so far as possible, to introduce equality among creditors. Before adverting to the statutes, however, it is necessary to consider how far, according to the general principles of the common law, attempts by a bankrupt to confer such preferences can be cut down or annulled. Erskine observes (Inst. iv. l. 44)—‘That creditors whose debts are contracted after the alienation made by the debtor, though they have no aid from the statutes, are not excluded from the remedies competent to them at common law. They are therefore entitled to an action for setting aside every right granted by the debtor to their prejudice, though previously to their own ground of debt, *if it carry in it evident marks of fraud*. Much more is this right of reduction competent to creditors whose grounds of debt were prior to the alienation, *if fraud appear ex facie* of the right, though their reasons of reduction can receive no support from any of the statutes.’ The qualification used in this passage of Mr. Erskine,—viz., ‘if it carry with it *evident marks of fraud*,’ ‘or if fraud appear *ex facie* of the right’—has occasioned difficulty. But one

thing has been fixed,—that however fraudulent may be the intention of the party paying, and who is aware of his own insolvency, the payment made to the creditor cannot be set aside if *he was* ignorant of the insolvency, and of the consequent fraud.”

“Where a payment of that kind is made to a creditor and sought to be reduced at common law, the burden of proving insol-

vency is thrown on the party reducing, contrary to the presumption established by the statutes."

"When the debtor has granted a conveyance of his whole effects to one creditor or more, to the exclusion of other creditors, this is considered on its face as a fraud, rendering the deed liable to reduction at common law."

"If a debtor, *anticipating* the term of payment, pays, and the creditor receives payment of a debt, and fails immediately thereafter, this, combined with proof of insolvency, will set aside the payment."

"If a debtor, instead of merely making payment of a debt in cash, grants heritable securities in favour of particular creditors, to the prejudice of others, it may happen that these stand clear of the operation of both the statutes, and yet they will be reducible at common law, though there be no proof that the creditors receiving them were aware of the insolvency (*Grant v. Grant's Crs.*, Nov. 9, 1748, M. 951, Elch. 'Fraud,' 19). The act of making a cash payment of a debt actually due is regarded as one done in the ordinary course of business, and which the creditor may consider as a legitimate payment. But the receiving of an heritable security is not an ordinary act of administration; it is the substitution of security for payment. It is quite fixed by this case, and by *McCowan v. Wright* (March 10, 1853, 15 D. 494), that it is not necessary to prove complicity in the creditor, on the ground that the injury to the general body is the same whether he knew that the security is a fraud or not."

"In aid of the common law, by which the *onus probandi* is thrown on the challenger, certain statutory provisions have been introduced, by which, in the cases to which they are applicable, the presumption is reversed, and the burden of supporting the deed is thrown on the holder of the deed as the receiver of the payment. These are the statutes 1621, c. 18, and 1696, c. 5."

"The Act 1621 consists of two parts, which are but slightly connected with each other."

Preferences reducible under 1621, c. 18.

"By the first, 'all alienations, dispositions, assignations, and translations whatsoever made by the debtor of any of his lands, teinds, reversions, actions, debts, or goods whatsoever, to any conjunct and confident person, without true, just, and necessary causes, and without a just price really paid, the same being done after the contracting of lawful debts from true creditors,' are to be declared 'to have been from the beginning and to be in all times

coming null, and of none avail, force, or effect, at the instance of the true and just creditor, by way of action, exception, or reply.' It then provides that 'it shall be sufficient probaton of the fraud intended against the creditors if they or any of them shall be able to verify by writ or oath of the party receiver' 'that the same was made without a true, just, and necessary cause, or without any true and competent price;' and thirdly, it provides that in the case of onerous purchases from the interposed person, the right granted shall not be annulled, but the receiver of the price from the buyer shall be holden and obliged to make the same forthcoming for behoof of the bankrupt's true creditors."

Challenges of preference by prior and posterior creditors.

"The party bringing the challenge must, in order to obtain the full benefit of the statutory presumptions, be a person whose debt was contracted prior to the alienation challenged. But this does not absolutely exclude a challenge by posterior creditors; though it does not put them in so favourable a position as prior creditors. The chief difference in their position appears to be this,—that the prior creditor is entitled to the presumption of insolvency at the date of the deed under challenge, while the posterior creditor is excluded from the presumption by the circumstances of his having himself transacted with the debtor as a solvent man after the date of the deed challenged. But if the insolvency is made out, there seems to be no difference as to the other presumptions established by the statute; such as that no value was given for the assignation or conveyance."(a)

"Creditors in future debts, or even conditional debts, have the right of challenge."

"To render any deed reducible under the statute it is necessary (1) that it shall be granted to a conjunct and confident person; (2) that it shall be granted to the prejudice of prior creditors, and without true, just, and necessary causes; and (3) that the grantor shall be insolvent at the time of granting. If the first of these things be apparent on the face of the deed, this raises the legal presumption in regard to the other two, and throws on the supporter of the deed the burden of either proving solvency at its date, or of establishing that a proper consideration was given for the deed."(b)

"If the deed challenged be granted to a 'conjunct or confi-

(a) Bell's Com. ii. 184; *Edmond v. Grant*, June 1, 1853, 15 D. 703.

(b) Bell's Com. ii. 186; *supra*, § 14.

dent' person,(c) the grantee must prove one of two things—that a proper consideration was granted for the disposition, assignation, or other deed of transference in his favour; or that a just price was paid. The words of the statute are—'without true, just, and necessary causes, and without a just price really paid.' It is now fixed that these terms are to be taken not conjunctively but alternately (*Grant v. Grant, supra*)."

Defence of proper consideration.

"Where the consideration alleged is a price paid, it seems sufficient to show that a fair price was paid, without the necessity of showing that a higher might not have been obtained; the consideration, if fairly given, will not be weighed in the nicest scales; and accordingly, in such a case as the sale of an annuity, the consideration is to be measured by its value in the market at the time, and not according to the event."

"Where, on the other hand, the alleged consideration is not price, but a previous onerous obligation which the granter has simply implemented, the onerous obligation must have existed at a time when the granter was solvent. With regard to the state of the case, the rules seem shortly and correctly laid down by Mr. Bell in this way (vol. 2, p. 192):—'That if the documents produced in fortification of the deed challenged be anterior to the challenger's debt, they will have the effect of obliging the challenger as a prior creditor to prove insolvency, &c., as at or rather prior to the date of the documents; (2) that if they be not anterior to the challenger's debt, they leave the challenger in as full possession of the legal presumptions under the Act as if they had been the original object of his challenge; and the holder must prove either solvency in the granter at the date of the documents, or onerosity in the debt.'"

"Supposing the obligation is apparently prior to the deed challenged, the next question which occurs is, What is a conveyance for *necessary* causes?"

"On the one hand, a proper legal obligation undertaken during solvency will protect the deed granted in implement of it after insolvency from challenge. The prior obligation is a necessary cause. The party is only doing what by law he was previously bound to do, though the prior obligation did not necessarily imply that he was to grant that particular form of deed."

"But what is a *sufficient* prior obligation to exclude the challenge under the Act 1621? If an onerous obligation has been

Obligation in antenuptial contract;

(c) For definitions of these terms, see above, § 12.

once undertaken in an antenuptial contract of marriage, there seems no doubt that the actual deed of conveyance by which the security in favour of the wife is carried out will not be challengeable, though between the date of the marriage-contract and the deed the grantor should have become insolvent. And Erskine seems to extend the doctrine so far that even if the grantor of the deed were insolvent at the time of entering on the marriage, these provisions and conditions, as being onerous obligations, would be sufficient to sustain a deed subsequently executed as in implement of a prior onerous obligation. And he refers to various cases in support of that doctrine (Inst. b. 4, t. 1, § 33").(d)

in postnuptial  
contract.

"With regard to provisions in favour of wives, granted by postnuptial contract, the rule is different. The marriage not being contracted on the faith of any such onerous provision, the same principle cannot be pleaded on the part of the wife. But still the law recognises a species of onerosity to this extent, that every wife is presumed to marry on the footing of some provision being made for her, and it seems to be the law that, to the extent of a reasonable provision (a matter somewhat arbitrary, and within the discretion of the Court), a deed granted after insolvency for the purpose of securing such a provision to the wife will be sustained, at least in any challenge under the Act 1621."(e)

Defence of  
solvency at the  
date of the  
deed.

"If the grantee does not allege that the deed is necessary, and denies the insolvency at the time when it was granted, it seems now to be established that while insolvency of the debtor at the time of challenge presumes insolvency at the date of the deed, this presumption may be redargued by contrary proof."

"The question, what is solvency in regard to this matter, has been practically resolved in this way, that if at the time of granting there was an apparent estate sufficient to meet the insolvent's obligations, he is not held to have been insolvent, to the effect of cutting down his conveyances, though *ex eventu* from the sinking in the value of securities, the failure of debtors, the diminution of the profits of business through changes of the market, or the stoppage of extensive trade-concerns through such causes as the failure of the cotton-supply, or similar contingencies, he turns out ultimately, or even within a short time of the granting of the con-

(d) *Supra*, § 13; Bell's Com. ii. 188; M'Laren on Wills, &c., i. 419.

(e) This cannot be held as settled law, and indeed is contrary to the tendency of recent decisions (see M'Laren on Wills and Succession, &c., i. 423, 4).

veyance challenged, to be insolvent, or bankrupt. If there was fair reason both for the granter and receiver of the deed to think there was no actual insolvency, taking into view the reasonable prospects of realising the stock, as compared with the engagements, the deed will be supported, at least so far as any challenge under the first branch of the Act 1621 is concerned."

"In cases under this statute, undue delay on the part of the creditor will bar the remedy; or at least the creditor will lose the benefit of the statutory presumptions of insolvency or want of consideration, and will, in short, be placed in the same position as in a reduction of any ordinary deed. What constitutes undue delay must in almost every case depend on circumstances." Delay of creditor.

"The second branch of the Act 1621 was intended to protect creditors who had proceeded to a certain extent with diligence against their debtor, from voluntary payments or conveyances being granted by the debtor before they could complete their diligence; and provides, 'that if in time coming the debtor shall make any voluntary payment or right to any person in defraud of the lawful and more timely diligence of another creditor having served inhibition, or used horning, arrestment, comprising, or other lawful means duly to affect the debtor's lands or goods, or price thereof, to his behoof,' such right or payment shall be subject to reduction, and that the creditor who carries on the reduction shall be entitled to the sum which was voluntarily paid by the debtor to the other creditor." Act 1621—second branch.

"The action must be brought by a creditor who has begun diligence. The deed challenged must be voluntary, and in defraud of the creditor's diligence. The statute does not apply to payments in cash, the reason assigned by Lord Elchies (*Forbes v. Brebner*, 1751, M. 1128, Elchies, *voce* 'Bankrupt,' No. 26) being, that 'though the Act 1621 mentions voluntary payments after diligence, yet it is after diligence duly to affect the subject, and no diligence duly affects money in a man's pocket.' If the payment, however, had been made not in money but by delivery of moveables, it was not doubted that such a transaction would have fallen under the statute (*Kilkerran in Forbes v. Brebner, cit.*)."

"Neither do *nova debita* fall within the Act."(g).

"The statute applies equally to absolute conveyances and to rights in security; and to transferences of moveables as well as heritage."

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(g) See above, § 15.

1696, c. 5.

Definition of  
notour bank-  
ruptcy.

"The Act 1696, c. 5, may be considered as the foundation of our law of bankruptcy. It gives a definition of bankruptcy, which is now modified by the existing Bankrupt Statute of 1856, 19 & 20 Vict. c. 79, § 3. As the law stands, bankruptcy is constituted (1.) by insolvency combined with imprisonment, or the absconding of the debtor from diligence; or (2.) when imprisonment is incompetent, by execution of arrestment of the debtor's effects not loosed within fifteen days, or of poinding of his moveables, or decret of adjudication against his heritable estate; or insolvency combined with sale of effects under a poinding or sequestration for rent, or retiring for twenty-four hours to the sanctuary, or making application for a *cessio bonorum*. (3.) It is also constituted by sequestration, or by the issuing of an adjudication of bankruptcy in England or Ireland. Notour bankruptcy of a company may be constituted in any of the foregoing ways, or by any of the partners being rendered bankrupt for a company debt; in other words, a company when insolvent may be rendered bankrupt by such proceedings against a partner for a company debt as would render that partner bankrupt were the debt his own." (h)

Who may be  
made bank-  
rupt.

"All persons against whom personal diligence may proceed according to the Act 1696 may be made notour bankrupt. A pupil, an idiot, or a lunatic may be made bankrupt according to the law of Scotland. A married woman whose husband is furth of Scotland, and who carries on business for herself, may also be made bankrupt (see *Chirnside v. Currie*, 1789, M. 6082; *Orme v. Diffors*, Nov. 30, 1833, 12 S. 149)."

"The state of bankruptcy being once fixed on the debtor, the Act 'declares all and whatsoever voluntary dispositions, assignments, or other deeds which shall be found to be made and granted directly or indirectly by the foresaid debtor or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days before, in favour of his creditor, either for his satisfaction or further security in preference to other creditors,' to be void and null."

"The title to challenge is confined to creditors whose debts existed prior to the date of the deed or transaction challenged (*Mair v. Walls*, 1702, M. 1006; *Robertson Barclay v. Lennox*, 1783, M. 1151)."

(h) A corporation, such as a royal burgh, may now be made bankrupt and sequestrated under the Act (*Wotherspoon v. Mags. of Linlithgow* Dec. 19, 1863, 2 Marph. 348).

"All direct deeds of alienation, whether redeemable or irre-<sup>Deeds struck at.</sup>deemable, in regard to heritage; and all assignations of moveables, or even delivery of moveables without any written title of transference; indorsations of bills; drafts made in favour of creditors on persons indebted to the bankrupt, if made in satisfaction or security of a prior debt, are directly struck at by the statute."

"To the operation of the statute certain exceptions have been<sup>Exceptions.</sup> admitted. Payments in cash are not held to fall within the statute (see Lord Elchies in *Forbes v. Brebner*, *cit.*). Payment in bank-notes, navy-bills, or similar representatives of currency, are held to be payments in cash. In *Gibson v. Forbes* (July 9, 1833, 11 S. 916) Lord Fullarton says the statute is directed not against *payment* in the proper sense of the term, that is the actual performance which the creditor was bound to accept of in extinction of the debt as originally constituted, but against *satisfaction*—*i.e.*, against those substitutes for such actual performance which could only be the result of a new and voluntary arrangement between the debtor and the creditor."<sup>(i)</sup>

"In like manner, transactions taking place in the ordinary course of trade have been held not to be struck at by the statute; as a payment made by draft or indorsation, if done in the usual course of business. Supposing a bill falls due which might be effectually paid by a payment in cash, and is paid by the discount of another bill, this has been held an unobjectionable payment. But where the bill given is of a distant date, which proves it rather to be a security than an ordinary payment; or when a bill is given, not in payment of a debt due, but in anticipation of what is not yet payable, the transaction or payment will be reducible (*Allan v. Blencow's Trs.*, Dec. 3, 1828, 7 S. 124; and Jan. 22, 1831, 9 S. 117, *aff.* Aug. 28, 1833, 7 W. & S. 26; *Speir v. Dunlop*, June 15, 1825, 4 S. 92, *rem.* 2 W. & S. 253; May 30, 1827, 5 S. 680)."

"In *Mitchell v. Rodger* (June 26, 1834, 12 S. 802) it was held that the extinction of a principal obligation to which a cautionary obligation was attached, if made in contemplation of bankruptcy, and for the purpose of relieving the cautioner, is struck at so far as to give the creditors recourse against the *cautioner*; while as an extinction of the original obligation it may stand good to the creditor receiving the payment."

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(i) See *Macfarlane v. Robb & Co.*, Dec. 24, 1870, 9 Macph. 370; *Steven v. Scott*, June 30, 1871, 9 Macph. 923; *Ferguson v. Welsh*, March 2, 1869, 7 Macph. 594.

"This decision goes much further than that of *Speir v. Dunlop*, in which the cash was paid, not for a debt then due, but as a security for a debt the term of payment of which had not arrived; and therefore it was held not to be a cash payment in the ordinary course of trade. Here the debt was due, and the payment made was not in security, but an actual and immediate extinction of a debt already due and exigible. Looking to the whole circumstances, the decision seems doubtful; and if the pure case should arise of the principal debtor, *without any communication with his cautioners*, paying up the balance due on his account with the bank, there is room for contending that a different decision should be arrived at."(*j*)

"It is a singular peculiarity, if it really exists, that while a payment by bill is held to be one in the ordinary course of trade, and is considered equivalent to a payment in cash, a payment by a promissory-note, though producing precisely the same effect as a bill, has been held insufficient to form an exception from the Act (see Bell's Com. ii. 219)."

"*Bonâ fide* sales for an adequate price are not within the statute. But attempts to evade the Act under the disguise of a sale have always been put down (*Eccles v. Merchiston's Crs.*, Feb. 4, 1729, M. 1128; *Dawson v. Lauder*, Feb. 4, 1840, 2 D. 525)."

"There is a certain class of deeds, however, which, although they have the effect of completing a security given to a creditor that would otherwise have been ineffectual, are yet not reached by the Act. Thus, suppose a proprietor of land uninfest, and having merely a personal right, sells, and the disponee takes infestment on the precept of sasine, his right is unavailing until the disponer has completed his own title; but this, it has been found, he may do effectually within the sixty days. In the same way, if an apparent heir sell his right, it is of course ineffectual to the purchaser till the disponer's title be completed by service, when the title will accresce to and validate the prior conveyance. It has been found competent for the apparent heir thus to complete his title within the sixty days (*Creditors of Graitney*, Feb. 1728, M. 1127; *Mac-lagan's Trs. v. Mac-lagan*, May, 21, 1800, M. App. 'Bankrupt,' 11). These cases have been justified either on the principle announced by the Court in *Mac-lagan's case*—viz., that the heir or disponer might have been compelled to make up titles, and there-

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(*j*) See *Caledonian Bank v. Kennedy's Trs.*, June 15, 1870, 8 Macph. 862.

fore that his doing so could not be considered as a voluntary deed, against which alone the statute strikes; or that the making up a title on the part of the debtor is not an act done directly in favour of a creditor."

"A third large class of exceptions is that of *nova debita*, where within the sixty days a contract is fairly entered into between the bankrupt and a third party for a price paid or adequate consideration instantly granted. This creates no preference over other creditors, since the price is received by the bankrupt, and is available through him to the creditors. Thus, a sale for a fair price is good; a bond granted for money advanced at the time is good, though both the granting of the deed and the infetment taken on it are within the sixty days (*Johnston v. Burnet*, Jan. 29, 1751, M. 1130, 1142)."

"After extreme fluctuation of opinion, it has been held that where money is advanced in contemplation and on the faith of a security to be granted over a specific subject it is a *novum debitum*, to which the statute does not apply. But if there be merely a promise or agreement for a security generally, without specifying any particular subject, the statute is held to apply to the security when it comes to be granted, as being truly a security for a prior debt—a narrow ground of distinction, for which there seems little foundation in equity (*Bank of Scotland v. Stewart*, Feb. 8, 1811, F.C.; *Cormack v. Anderson*, July 8, 1829, 7 S. 868; *Anderson v. Walker*, March 29, 1842, 4 D. 1186)."

"If in carrying through a transaction a mistake has been committed, whereby the one party does not fully convey, and the other receive, that which both of them understood at the time to be conveyed, can the debtor interpose to correct a mistake within sixty days, and give to the creditor what he had bargained to receive? Mr. Bell (Com. ii. 233) expresses his opinion in the affirmative. But *Mansfield v. Walker's Trs.* (June 28, 1833, 11 S. 813), though not decided expressly on the ground that such a mistake cannot be corrected within the sixty days, is rather opposed to the opinion of Mr. Bell; for six judges out of those consulted held that the Act 1696 would strike against such a transaction, while the others placed their ultimate decision on a different ground."

"Again, suppose a bargain concluded, the price paid, but that the article purchased remains in the hands of the seller, marked as the property of the purchaser, and is only ultimately delivered within the sixty days of the seller's bankruptcy, the Act 1696 does not strike against the delivery. The ground of this opinion

is substantially this—that the Act does not apply where *specific implement* of the obligation is given in the way in which the party has agreed to implement it (*Gibson v. Forbes*, July 9, 1833, 11 & 916).” But the delivery in such a case cannot now be challenged, whether the goods are marked as the property of the purchaser or not (19 & 20 Vict. c. 60, § 1).

Computation  
of the sixty  
days.

“The sixty days are to be computed, according to the decision in *Blackie v. Cleggs* (Jan. 21, 1809, F.C.), excluding the day on which the challengeable deed is granted, and they are complete from the moment the sixtieth day thereafter begins (see *Mercer v. Ogilvie*, *supra*, b. iii. t. 8, § 47; *Anderson v. Fletcher, Starkie, & Co.*, March 2, 1813, F.C.).”

“The statute 1696 provides, ‘That all dispositions, heritable bonds, or other heritable rights on which infestment may follow, granted by the foresaid bankrupts, shall only be reckoned as to this case of bankruptcy to be of the date of the sasine lawfully taken thereon, but without prejudice to the validity of the said heritable rights as to all other effects as formerly.’ It was contended that the date of recording the infestment, and not the mere date of the infestment itself, was the thing to be kept in view, and that if the registration fell within the sixty days, though the infestment itself was beyond it, this brought the security or disposition so granted within the statute. All doubt on the subject was removed by 54 Geo. III. c. 37, § 12, which made the date of recording the sasine, and not the sasine itself, the criterion of preference obtained within the sixty days, and this has been retained in our modern Bankruptcy Statute, 19 & 20 Vict. c. 79. As already said, an exception occurs where the conveyance is in security of a *novum debitum*, stipulated for at the time as *pars negotii*.”

“In the case of a person not himself infest, but holding only a personal title, which he assigns, it has been held that the date from which the sixty days run is that of the conveyance, not of the completed feudal title either by infestment or registration of the infestment or its equivalent. Such an assignation, it has been said, is not on strict feudal principles a *right* whereupon infestment may follow, but only a *transference* of a right on which infestment may follow—a very narrow and not very satisfactory distinction (see Bell’s Com. ii. 229, 230; *Scott of Blair’s Crs. v. Charters*, 1734, M. 1239).”

“The first attempt to establish a general process of distribution

in bankruptcy, which should incorporate and extend the remedies separately provided by the earlier statute, was the Act 12 Geo. III., passed in the year 1772, which introduced a general sequestration of the whole heritable and moveable estate of the bankrupt, and the vesting of both in a trustee, with a view to distribution among the creditors according to their legal rights of preference. It is somewhat remarkable that, in the outset, the law of sequestration was not limited to merchants or traders, but embraced debtors of all kinds, while the course of subsequent legislation was to confine it entirely to persons engaged in trade. On the other hand, sequestration, which was originally confined to the moveable estate of the debtor, has by subsequent statutes been extended so as to apply to the whole property of the bankrupt, heritable and moveable."

"I need not trace the history of mercantile sequestration through its successive steps up to the existing Act, 19 & 20 Vict. c. 79. I propose merely to give an outline of the leading provisions of that Act, so far as they differ from the arrangements under the old law. In many of its provisions it merely repeats, with certain modifications and extensions, the provisions of the immediately preceding statute, the 2 & 3 Vict. c. 41, which had again modified and extended that of the 54 Geo. III. c. 137; but in one particular it introduces an important novelty. The Act 2 & 3 Vict. c. 41, § 4, had for the first time made it competent to sequester the estate of a deceased debtor, whether he had been a trader or not, if at the time of his decease he resided or had a dwelling-house or carried on business in Scotland, and was at the time owner of heritable or moveable estates in Scotland. But while it was competent to sequester the estate of a *deceased* debtor, whether he had been a trader or not, sequestration in the case of a living debtor was only competent if he had been actually engaged in trade in some way or other, as defined by § 5 of the Act, and by § 10 of 5 & 6 Vict. c. 122."

"All restrictions of this kind are at an end, for § 13 provides that any person may be sequestered if subject to the jurisdiction of the Supreme Courts of Scotland; and this jurisdiction has been held sufficiently constituted against a foreigner by a residence in Scotland of forty days (*Joel v. Gill*, Nov. 23, 1859, 22 D. 6). But the sequestration may be recalled if three-fourths in number and value of the creditors reside in England or Ireland, and if it shall appear to the Court of Session more expedient that the bankrupt's

Introduction  
of sequestra-  
tion in bank-  
ruptcy.

estate should be distributed in the Courts of either of these countries (23 & 24 Vict. c. 33)."

"In the case of sequestration of deceased debtors, notour bankruptcy is not required; it is sufficient if the petitioning creditor's debt was due at the time of the death; nor is it necessary that the deceased shall have resided or have a dwelling-place in Scotland, if he was in any way subject to the jurisdiction of the Scotch Courts, as by the possession of heritable property."

"By § 18 sequestration may be awarded, not only as formerly by the Court of Session, but by the Sheriff, and that both in the case of living and deceased debtors; in the latter case it must be awarded by the Sheriff of the county in which the debtor for the year preceding his death had resided or carried on business."

"It is competent to apply to the Lord Ordinary for recall of the sequestration within forty days after the deliverance granting it; and that either on the grounds originally urged by the bankrupt, or by any opposing creditor, or on new grounds subsequently emerging (§ 31)."

"After sequestration has been awarded, instead of the estate being wound up by the ordinary process of sequestration, or by the offer and acceptance of a composition, the creditors to the extent of four-fifths in number and value may resolve that the estate ought to be wound up under a deed of arrangement, which deed the creditors are to present to the Lord Ordinary, subscribed by them; and if satisfied that such deed of arrangement has been duly executed and is reasonable, he shall approve thereof, and declare the sequestration at an end. If from any of the causes referred to in the Act the agreement is not approved of, the sequestration proceeds in its usual course (§§ 35, 40)."

"The 53rd section introduces this change, that when the claim of a debtor depends upon a contingency which is unascertained at the date of lodging his claim, he may have it valued, and the Sheriff, or trustee, if a trustee has been elected, shall put a value thereon as at the date of the valuation, the rule formerly being that the date of the sequestration formed the period at which the valuation was to be made. But by the 54th section annuities are still to be valued as at the date of the sequestration."

"The 57th section practically abolishes the office of interim factor, by directing the Lord Ordinary or Sheriff to appoint a meeting of creditors for the election of a *trustee* or *trustees* in succession."

"The 102nd section fixes and describes the legal effect of the act and warrant of confirmation in favour of the trustee :—(1.) It vests the moveable estate as if actual delivery or possession had been obtained, or intimation made as at the date of the sequestration ; subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible. The whole moveable estate of the bankrupt being instantly transferred to the trustee, any creditor who has begun proceedings to attach it, if the effect of these proceedings be not altogether cut down, must claim the benefit of them in the sequestration, and cannot follow them out to the exclusion of the trustee. The preference of the creditor, if such there be, is reserved in the sequestration. The provisions as to the vesting of the moveable estate require to be taken in connection with the first four sections of the Mercantile Law Amendment Act.<sup>(k)</sup> (2.) The heritable estate is by the act and warrant of confirmation transferred to the trustee, to the same effect as if a decree of adjudication in implement of sale, as well as a decret of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a poiding of the ground had been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible."

Confirmation  
of trustee—  
Vesting of  
estate.

"Under this the whole heritable property of the bankrupt vests, to the exclusion of a creditor who had got a personal right to lands from the ancestor of a bankrupt, but had not taken infestment on it, and who was found not entitled to adjudge after the sequestration of the bankrupt, who had a feudal right completed by infestment, and whose right had by the statutory sequestration passed to the trustee (*Lawrie v. Lawrie*, March 10, 1854, 16 D. 860). Neither will the trustee's right be excluded even by a conveyance of heritage followed by infestment, if no actual possession has followed, and the right was truly *granted in trust* for political purposes (*Lindsay v. Giles*, Feb. 27, 1844, 6 D. 771);—contrast this case with *Lindsay v. Davidson* (March 23, 1853, 15 D. 583), where, actual possession having followed on an *ex facie* absolute disposition to persons who admitted that they were under an equitable right to denude on their claims being satisfied, it was held that the property stood vested in the absolute disponent, and was not conveyed to the trustee in the grantor's sequestration,

(k) Act 19 & 20 Vict. c. 60.

though the latter might have a right to insist for an accounting as to the rents recovered by the disponee."

"In *Dundas v. Morison* (Dec. 4, 1857, 20 D. 225), the trustee taking up a lease belonging to the bankrupt, and under which there was a considerable arrear of rent, was found to have subjected himself in liability for these arrears, the Lord Justice-Clerk observing—"It was the business of the trustee to have ascertained that no arrears of rent were due. The known rule of law must apply, that the assignee of a lease is liable for unpaid arrears of rent; that is, the burden which attaches to the assignee of a lease in the same way as liability for unpaid feu-duties attaches to the purchaser of property."

"By § 117 a power is given to the Lord Ordinary or the Court, on the application of the trustee, to grant warrant for interim payments out of the price of subjects sold of preferable claims, or to authorise an interim scheme of division."

"By § 112 it is provided that the wages of workmen, and of clerks and shopkeepers employed by the bankrupt, where such wages do not exceed sixty pounds per annum, shall be entitled to the same privileges as the wages of domestic servants, to the extent of a month's wages prior to the date of sequestration being awarded; or, when sequestration is not awarded, prior to the concurrence of diligence for distribution of the estate of a party being notour bankrupt."

"Formerly (*Campbell v. Paul*, Jan. 13, 1835, 13 S. 237), if an heritable creditor had taken any step towards rendering his preference over the moveables on the ground real, by even raising and executing a summons of poinding the ground prior to the confirmation of the trustee, this preserved his preference, and the trustee, taking the estate only subject to the burden of existing preferences, was obliged to give effect to the heritable creditor's preferable right."

"But by § 118 'no poinding of the ground which has not been carried into execution at least sixty days before the date of the sequestration, and no decree of mails and duties on which a charge has not been given at least sixty days before the said date, shall, except to the extent hereinafter mentioned, be available in any question with the interim factor or trustee.' The extent to which it continues available is, that the statute allows the creditor to poind even after sequestration, or obtain a decret of mails and duties; but in both cases his poinding or decret is available only

for the interest on the debt for the current term, and for the arrear of interest for one year immediately before the commencement of such term."

"The present law of bankruptcy may be said simply to give effect to the ordinary rules as to the preference of creditors in competition, whether in heritages or moveables, as modified from time to time (1) by the necessity of measures to prevent unfair preferences; and (2) by measures for preventing surprise in point of time, by one creditor obtaining preferences over another, even by fair means, by the operation of mere priority of action or of diligence; and (3) by the effort to simplify the forms and diminish the expenses which attend every process of distribution among creditors competing."—MOIR.

## NOTE B.

## CIVIL PROCEDURE.

The term 'procedure' may be defined as the body of rules which must be observed both by litigants and judges in the institution and conduct of legal proceedings before a court of law, and which have been laid down by custom, by the orders of the courts, or by the Legislature, for the purpose of duly protecting the interests of the parties, of ascertaining the facts of the case, and of ensuring the fair and impartial administration of justice. These rules accordingly lie imbedded in numerous statutes, acts of sederunt, decisions, and works on procedure; and those observed in the Court of Session differ in some respects from those applicable to the inferior courts. The leading objects to be kept in view, however, ought to be the same in all courts, and it may be useful to bring these distinctly before the student by giving a slight outline of the procedure observed in the Court of Session in most ordinary cases.<sup>(a)</sup>

For detailed information on the subject, the student is referred to the works of Mr. Mackay and Mr. Dove Wilson on Procedure.

Meaning of  
"procedure."

Statutes and  
Acts of Seder-  
unt as to pro-  
cedure.

(a) The chief statutes which now regulate the procedure of the Court of Session are 31 & 32 Vict. c. 100 (1868), and 13 & 14 Vict. c. 36 (1850); and the most important acts of sederunt are those of 11th July, 1828; 5th Feb., 1861; 15th July, 1865; and 14th Oct., 1868.

Object of an action.

Every ordinary action, whether petitory, declaratory, or reductive, proceeds on the ground that the pursuer is deprived of some right, or lies under some disability, in consequence of misunderstanding, neglect of duty, fault, or fraud on the part of the defender, or, it may be, of the public in general. He 'concludes' either for payment of a sum of money on one or more grounds, or for a 'declarator' by the Court that he is entitled to the enjoyment of a certain right which is withheld from him, or for the 'reduction' of certain documents or proceedings on the ground of their informality or illegality; or his action may embrace 'conclusions' or demands of several different kinds.

Framing of a summons.

The first step taken by the pursuer is to prepare the 'summons'—a document which consists of the 'summons' in a narrower sense, the 'condescendence' or statement of facts, and the 'pleas in law.'

In the summons, or first of these three parts, the pursuer sets forth distinctly the names of the parties, and the objects or 'conclusions' which he seeks to attain; and he may also here crave warrant to seize or arrest goods belonging to his debtor, or warrant of inhibition to prevent his debtor from alienating his heritable property (see *supra*, ii. 11).

In the condescendence he states or 'avers' the facts on which his case is founded.

In his pleas he contends that the rules of law applicable to his averments support or justify the conclusions of the summons.

The summons, which runs in the Queen's name, must be signed by a writer to the Signet, and pass the Signet before it can be served on the defender. The condescendence and pleas in law may be signed by any authorised law-agent.

Serving of the summons.

The next step is the serving of the summons, which consists in the delivery of a copy of it to the defender by a messenger-at-arms, or by a sheriff-officer, if there be no messenger in the county. This is the challenge or declaration of war, but the defender is indulged with a truce or *induciæ* of seven days, or fourteen if out of Scotland (in which case the service must be edictal, not personal), during which he may either comply with the pursuer's demands or prepare to resist them. If within the *induciæ* the defender takes no notice of the demands thus made, the pursuer next lodges the summons with the clerk of one of the Lords Ordinary, having appended to it a marginal note called the *partibus*, which states the names of the pursuer and his counsel

*Inducia.*

and agent, of the defender, and of the Lord Ordinary before whom the cause is to depend. On the next sederunt day, or day on which the Court sits, the summons is 'called'—a formality which now consists in printing the *partibus* in the rolls of Court, which are exhibited to public view. If the defender does not 'enter appearance' at the clerk's office within two days after the calling, the pursuer may enroll the case before the Lord Ordinary with a view to obtain decree in absence. On the other hand, if the pursuer fail to call the case within three sederunt days after the expiry of the *inducia*, the defender may lodge a protest; and if the pursuer fail to call it within nine days more, the defender may obtain an extract of his protest, the effect of which is to extinguish the pursuer's action. If the defender have entered appearance, he must lodge his 'defences' within ten days after the calling, and if he fail to do so, the pursuer may enroll the cause and obtain decree in absence: but within ten days thereafter such a decree may be recalled on the motion of the defender and payment of a penalty, whereupon he is reponed and allowed to lodge his defences. The defences consist of (1) answers to the pursuer's averments, which may be either denied, varied, explained, or admitted; (2) a statement, where necessary, of facts on which the defender founds his resistance to the pursuer's claim; and (3) one or more pleas in law, in which he maintains that the law applicable to the facts entitles him to 'absolvitor'—i.e., to be entirely 'assoilzied' or absolved from the conclusions of the summons, or at least to have the action against him dismissed. Along with the summons and defences, the parties must produce the deeds or writings on which they respectively found; or, in the case of an action of reduction of a deed, the pursuer calls upon the defender to produce the deed in question, and the defender must do so—i.e., 'satisfy production,' unless he can show that the pursuer has no title to make the demand.

The summons and defences together form the 'record,' of which the pursuer must, within eight days, lodge printed copies with the defender's agent and with the clerk of Court. After four, but within six days more, the Lord Ordinary puts the case to the roll for 'adjustment,' requires the parties to make any alterations or additions they may desire, and 'closes the record,' unless cause be shown for 'revisal,' which enables them to make greater changes. Even after the record is closed, amendments may still be made upon it at any time, so far as necessary for the determina-

Calling of the summons.

Entering appearance.

Decree in absence.

Protest for not calling summons.

Lodging of defences.

Decree in absence.

Reponing. Defences.

Production of writings founded on.

Satisfying production.

The record.

Adjustment.

Closing of the record. Revisal.

Amendments.

Renouncing  
probation.

Debate roll.

tion of the question at issue, but not if they in any degree increase the pursuer's demands, and generally on condition of paying a sum in respect of the expense caused by such a course. At the closing of the record, when no material fact is disputed, and when the result of the case depends on the manner in which the rules of law are to be applied to it, parties renounce probation, and in this case the cause is sent to the 'debate roll.' The Lord Ordinary then hears a debate on the merits, and pronounces an interlocutor either giving the pursuer decree in terms of one or more of the conclusions of the summons, or dismissing the action (in which case the pursuer may raise another on the same grounds), or assolzieing (*i.e.*, absolving) the defender from the conclusions (in which case the pursuer is precluded from raising another action against the defender on the same grounds), and with certain findings as to the expenses of the cause.

Procedure roll.

Fixing diet of  
proof.

Diligence to  
examine wit-  
nesses and  
havers.

If there be disputed facts, there may be doubt as to whether the facts alleged are relevant to the issue, or whether any pleas in law can be dealt with before probation, in which circumstances the case is sent to the 'procedure roll;' or, lastly, where the parties are agreed as to the necessity for inquiry regarding the facts, the Lord Ordinary appoints a diet of proof, or in certain cases (*b*) orders 'issues' with a view to the trial of the cause by jury.

Disposal of  
the cause by  
the Lord  
Ordinary.

Trial by jury.

When one of the parties refuses or delays to produce documents necessary for the trial of the case, his opponent may lodge a list or 'specification' of them, and move the Lord Ordinary to grant diligence for their recovery. Or a motion may be made for a diligence to examine witnesses whose evidence is likely to be lost owing to illness, old age, or unavoidable absence. In these cases a commissioner is appointed to examine the 'havers' or holders of the documents, or the witnesses specified, and his report, together with the documents produced, then forms part of the proof to be afterwards led, whether before a jury or before the Lord Ordinary. Where the Lord Ordinary takes a 'proof,' each party adduces witnesses to prove his statements, and which is followed by a 'hearing on evidence.'

If the cause is to be tried by jury, the trial is presided over by one judge, whose duty is to inform or 'direct' the jury regarding points of law involved in the case, and to sum up the evidence

(b) See 13 & 14 Vict. c. 36, § 49.

in his final 'charge,' while the jury, consisting of twelve members, has to pronounce a verdict or finding upon the facts. The verdict must be unanimous, unless the jury has been enclosed for more than three hours, or unless the parties consent to accept a verdict by a majority. If unable to agree within six hours, the jury may be discharged. On the other hand, the parties may arrange a compromise; or the pursuer may, at any time before the judge's charge, with the judge's leave, abandon his case. Against the verdict of the jury there is no direct appeal; but if either party is dissatisfied with the rulings or 'directions' of the presiding judge, and objects or 'excepts' to them at the trial, he may, within the first six days of the ensuing session, or (if the case has been tried during session) within ten days after the trial, move the Inner House for a new trial or present a 'bill of exceptions.' The Court may then find that, owing to a misdirection of the presiding judge, the verdict should be 'entered' for the objector (*i.e.*, practically reversed), or that a new trial should be granted, and this may be done on the ground that the verdict is contrary to evidence, or that the damages are excessive.

Motion for  
new trial;  
bill of excep-  
tions.

Certain cases of urgency may be brought, at any time throughout the year, before a department of the Court called the 'Bill-Chamber,' presided over by the 'Lord Ordinary on the Bills' (*i.e.*, the Junior Lord Ordinary during session, and in vacation by other judges appointed in rotation). The cases competent in this Court are 'suspensions,' 'suspensions and interdicts,' and 'suspensions and liberations,' proceedings of a summary character, in which great injustice might result from delay. In a 'note of suspension' the 'suspender' prays the Court to stay or suspend the execution of a decree or of a threatened charge on a bond or on a protested bill. The note is at once intimated to the respondent, who may lodge answers. If the suspender's statements show no good reason for the remedy craved, the note is refused; but if he has made out a *prima facie* case, the note is 'passed' (*i.e.*, the remedy is provisionally granted), the suspender being usually obliged to consign the sum for which decree has gone out against him, or to find caution *judicatum solvi*—*i.e.*, that he will implement the decree if ultimately unsuccessful. The note may, however, be passed without caution or consignment if the proceedings and decree complained of have been manifestly irregular. The note having been passed by an interlocutor which has become final (*i.e.*, which has not been reclaimed against, or which, having been

Bill-chamber.

Suspensions.

Passing of the  
note.

Suspension then becomes an ordinary case in the Court of Session.

Interdict.

reclaimed against, is affirmed by the Inner House), the case becomes an ordinary Court of Session cause; a record is made up, after proof or further procedure the Court decides whether remedy provisionally granted is to become permanent or to be recalled. In the case of a 'suspension and interdict,' where the object of the 'complainer' is to have the respondent 'interdicted' or prohibited from encroaching on his property or infringing rights, the procedure is similar; and the same remark applies to the nearly obsolete 'suspension and liberation,' where the petitioner further craves liberation from imprisonment.

Petitions competent in the Outer House.

Although the chief function of the Inner House is that of a court of appeal, legal proceedings in some cases, chiefly of an administrative character, are initiated in one of its two Divisions. The exercise of the *nobile officium*, or equitable discretion of the Court, is, however, to a large extent delegated to the Junior Lord Ordinary in the case of petitions. Most petitions are now presented to the Junior Lord Ordinary, the most important being petitions under the Entail Acts, the Railway Acts, the Lands Clauses Consolidation Act (1845), the Pupils Protection Act (1849), the Bankruptcy Act (1856), and local and personal Acts; and also petitions for the appointment of tutors-dative, judicial factors, and curators bonis, and applications by them for special powers and for discharge. In such cases the applicant presents a petition to the Junior Lord Ordinary, stating his case, and concluding with 'prayer,' in which the acts to be authorised are clearly and succinctly stated. If the petition be incidental to other proceedings it must be presented to the judge or Division before whom they are pending. The petition is then, by order of the judge, 'intimated to' and 'served upon' all parties interested, in order that they may have an opportunity of lodging answers before the expiry of the usual *induciae* of eight days. Whether answers are lodged or not, the Lord Ordinary usually remits the petition to a 'man of skill' to enquire into the circumstances of the case, on consideration of whose report he either grants or refuses the prayer of the petition. The Lord Ordinary's interlocutor may, however, be reclaimed against by the petitioner or by the respondent within eight days. Certain petitions, however, are competent in the Inner House only. The chief of these are petitions by tutors to nominate for special powers; by judicial factors on sequestrated estates for approval of their proposed distribution of the funds to beneficiaries for the removal of trustees; petitions objecting

Intimation and service.

Remits to men of skill.

Petitions competent in the Inner House only.

burgh accounts (3 Geo. IV. c. 91, § 3); and petitions impugning the election of members of Parliament (31 & 32 Vict. c. 125, § 58).

Where parties are agreed as to certain facts, but are at issue with regard to the law applicable to them, they may present a 'special case' to one of the Divisions, stating the facts, and craving an answer to one or more questions of law.

Inner House.  
Special cases  
on questions  
of law.

Judgments of a Lord Ordinary, or of the Lord Ordinary on the Bills, are generally subject to review by the Inner House. This review is asked for in an appeal called a 'reclaiming note.' Final judgments of the Lord Ordinary disposing of the merits must be reclaimed against within twenty-one days of their date; 'interlocutory' or incidental judgments, such as those sustaining or repelling a preliminary or dilatory defence, within ten days after the Lord Ordinary's leave has been obtained; and interlocutors appointing or refusing proof; and likewise motions to vary issues adjusted by the Lord Ordinary, within six days of their date.

Reclaiming  
notes.

The reclaiming note is boxed or presented to one of the Divisions, and copies of it are served upon the respondent; it is then enrolled on the following day among the 'single bills' or motions, and unless its validity is open to some objection capable of being summarily disposed of, it is sent to the roll of ordinary cases depending before the Division, called the 'short roll,' unless the matter be urgent, in which case it is sent to the 'summar roll,' which takes precedence of the ordinary roll. The Court may dispense with the printing of lengthened proofs and documents, especially if either party sues *in forma pauperis*. If, after the debate, the judges are equally divided in opinion, they may order the case to be re-heard before themselves and three judges of the other Division. The procedure in the case of a reclaiming note against a judgment in the Bill Chamber is similar. The note must be lodged within fourteen days, but its presentation does not suspend the operation of the Lord Ordinary's judgment, unless, on special cause shown, he expressly stays execution.

Boxing the  
note.

Enrolment in  
single bills.

A judgment in the Sheriff Court, whether pronounced by the Sheriff or by the Sheriff Substitute, where the sum at stake is above £25, may be submitted to the review of the Inner House; and this is termed an 'appeal' in a narrower sense of the word. Appeals must be brought within six months; but as the Sheriff's judgment may be extracted and execution may proceed on it after fourteen days from its date, the time for appealing is practically

limited to fourteen days. If the judgment has been extracted, the appeal takes the form of a 'suspension.' Notice of the appeal is given to the sheriff-clerk, who, within two days transmits the process to the clerk of the Division appealed to; and within fourteen days more the appellant must print the note of appeal together with the proof and documents founded on, and lodge a copy of it in process. If the appellant fails to comply with these rules, his appeal is dismissed; but, if he shows reasonable cause for his failure, he may be reponed within eight days. Application to dispense with printing must be made within eight days after the clerk has received the process. The subsequent procedure is the same as in the case of reclaiming notes.

Special statutes regulating Inner House procedure.

Appeals to the House of Lords.

In a few cases the procedure in the Inner House is somewhat different, as under the Debts Recovery Act (1867), and the Summary Prosecutions Appeal Act (1875).

Against the final judgment of one of the Divisions of the Court of Session, in all ordinary cases, an appeal to the House of Lords may competently be brought within two years; but against interlocutory judgments an appeal cannot be taken without the leave of the Court, unless there has been a difference of opinion among the judges. The appeal is in the form of a petition to the House of Lords, praying that the judgment of the Court below may be reversed or varied; and the effect of serving the appeal upon the respondent is to stay the execution of the judgment; but the Division by which it has been pronounced may, on a petition by the successful party, showing sufficient cause, grant warrant under certain conditions for interim execution of the decree, or for interim possession of the property in dispute, or for interim payment of costs already incurred. If the House of Lords affirms the judgment, the case is at an end, and the judgment can be carried into execution without further procedure; but in the event of a reversal or alteration of the judgment, the concluding step in the litigation consists in the presentation of a petition to the Court of Session for warrant to apply the judgment of the House of Lords.

Vacation.

During vacation or 'recess,' the ordinary business of the Court is suspended; but, as already mentioned, the Lord Ordinary on the Bills continues to sit for the transaction of business of an urgent character. The general rule as to *induciae*, or other periods allowed for different steps of procedure, is that when they expire in vacation the step which would otherwise immediately follow

must be taken on the first 'box-day' happening thereafter; or, in other words, appearance is entered, or production satisfied, or defences are lodged, or answers returned, on a day when the offices of the Court are open for the purpose. Summonses served during vacation must also be called on the ensuing box-day. The Lord Ordinary sits on the fifth day after each box-day, chiefly for the purpose of disposing of undefended causes, and of granting leave to reclaim in certain cases. If no box-day intervenes between the expiration of the various periods just referred to and the meeting of the Court, the ensuing step in the procedure must be taken on the first sederunt-day.

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TIT. II.—OF PROBATION.

1. All allegations by parties to a suit must be supported Probation; by proper proof. Probation is either by writing, by the party's own oath, or by witnesses. In the case of allegations, which may be proved by either of the three ways, a proof is said to be admitted *prout de jure*; because in such case all *prout de jure*; the legal methods of probation are competent to the party: if the proof he brings by writing be lame, (a) he may have recourse either to witnesses or to his adversary's oath; but if he should first take himself to the proof by oath, he cannot thereafter use any other probation, for the reason assigned, § 3; and, on the contrary, a pursuer who had brought a proof by witnesses, on an extracted act, was not allowed to recur to the oath of the defender (*Macbrair v. Robertson*, Nov. 18, 1737, M. 12,156). (b) Single combat, as a sort of appeal to by single combat; Providence, was by our ancient law admitted as evidence in matters both civil and criminal (R. M., l. 3, c. 13, § 4). It (2) was restricted by St. R. iii. c. 16, to the case of such capital

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(a) See above, b. iii. t. 2.

(b) In modern practice a reference may be made to the oath of a party, even after a verdict or judgment, if the decree be not extracted; but after judgment the reference must be of the whole cause (*Clerk v. Hyndman*, Nov. 20, 1819, F.C.; *Longworth v. Yelverton*, March 10, 1865, 3 Macph. 645, aff. July 30, 1867, 5 Macph. H.L. 144; *White v. Murdoch*, June 9, 1812, F.C.; *Campbell v. Turner*, June 15, 1822, 1 S. 538).

crimes where no other proof could be had; and some traces of this blind method of trial remained in the reign of James VI., 1600, c. 12; for even by that Act the King might authorise duels on weighty occasions.

by writing.

(4)

Books of accounts, how far probative for the merchant.

Notarial instruments, how far probative.

(5)

Probation by oath of party on reference.

(8)

2. As obligations or deeds, signed by the party himself, or his ancestors or authors, must be of all evidence the least liable to exception; therefore every debt or allegation may be proved by proper evidence in writing. The solemnities essential to probative deeds have been already explained (iii. 2, § 3 *et seq.*). Books of accounts kept by merchants, tradesmen, and other dealers in business, though not subscribed, are probative against him who keeps them; and in case of furnishings by a shopkeeper, such books, if they are regularly kept by him, supported by the testimony of a single witness, afford a *semiplena probatio* in his favour, which becomes full evidence by his own oath in supplement (*Wood v. Kello*, June 5, 1672, M. 12,728). (c) Notarial instruments and executions by messengers bear full evidence that the solemnities therein set forth were used, not to be invalidated otherwise than by a proof of falsehood, but they do not prove any other extrinsic facts therein averred against third parties, (d) nor are they evidence of the warrant on which they proceed: thus, a seisin does not prove the existence of the relative charter (*Norval v. Hunter*, Dec. 20, 1664, M. 12,517); *non enim creditur referenti, nisi constet de relato*. (e)

3. Regularly, no person's right can be proved by his own oath, nor taken away by that of his adversary; because these are the bare averments of parties in their own favour. (f)

(c) A pass-book between a bank and a depositor, kept by the bank officials, and initialed by them, though evidence against the bank, may be redargued by evidence *prout de jure* (*Rhind v. Commercial Bank*, Feb. 24, 1857, 19 D. 519; rev. Feb. 10, 1860, 3 Macq. 643).

(d) But they may give rise to presumptions. An execution of search by a messenger may lead to the inference that a debtor has absconded (*M'Bean v. Wright*, Oct. 24, 1868, 7 Macph. 23).

(e) Notarial instruments are inadmissible as evidence where law does not require such evidence, contrary to Inst. § 6 (Dickson on Evid. 1188).

(f) Parties are now competent witnesses, except in criminal proceedings (15 & 16 Vict. c. 20, §§ 3, 4; 24 & 25 Vict. c. 86, § 7; 37 & 38

But where the matter at issue is referred by one of the parties to the oath of the other, such oath, though made in favour of the deponent himself, is decisive of the point: (g) not because a party's oath in his own cause is evidence, but because the reference is a virtual contract between the litigants, by which they are understood to put the issue of the cause upon what shall be deposed: and this contract is so strictly regarded that the party who refers to the oath of the other cannot afterwards, in a civil action, plead upon any deed against the party deposing inconsistent with his oath (*Ferguson v. Maitland*, 1722, M. 14,042). To obviate the snares that may be laid for perjury, he to whose oath of verity a point is referred may refuse to depose till his adversary swear that he can bring no other evidence in proof of his allegation (Stair iv. 44, § 2). (h) The party to whom reference is made, in place of making oath, sometimes defers the point back to his adversary; but this is not indulged unless it shall appear, from the circumstances of the case, that he himself cannot depose in the matter referred to him with distinctness.

4. A defender, though he cannot be compelled to swear to facts in a libel properly criminal, yet may, in trespasses, where the conclusion is limited to a fine, or to damages—*e.g.*, in blood-wits (*Tait, Bailie of Melrose v. Darling*, Feb. 13, 1634, M. 7300); in batteries (*Gordon v. Cruickshanks*, July 24, 1668, M. 9397); or injuries (*Fiscal of Edinburgh v. Campbell*, Jan. 2, 1736, M. 9400). (i) Wives are obliged to

In what cases a party may refuse to depose.

(9)

Vict. c. 64, § 2). Adducing a party as a witness renders it incompetent to refer to his oath; but not if his evidence be disallowed, or he has been incompetently examined (*Swanson v. Gallie*, Dec. 3, 1870 9 Macph. 208).

(g) The Court has a discretionary power to allow or refuse the reference to oath (*Ritchie v. Mackay*, March 7, 1826, 4 S. 434, aff. June 24, 1829, 3 W. & S. 484; *Longworth v. Yelverton*, *supra*); or it may attach conditions (*Pattinson v. Robertson*, Dec. 4, 1846, 9 D. 226).

(h) So in Bell's Prin. 2264. No modern decision supports this doctrine.

(i) Probably this would not now be allowed. Even in actions of damages founded on criminal acts reference to oath has been held inadmissible (*Dickson on Evid.*, 1549, 1550; *Cameron v. Paul*, Dec. 5, 1853 1 Irv. 316; see also *supra*, § 3, note f).

An oath of party affects only the litigants.

(10)

make oath on debts contracted by them before marriage (*Ker v. Lady Covington*, March 9, 1627, M. 12,489); and executors on debts due by the deceased (*Ker v. Lady Covington*, March 13, 1627, M. 12,478); which oaths are effectual against themselves as to their proper interest: but the husband cannot be affected by the wife's oath;(k) nor the relict or others concerned in the executry by that of the executor, who is merely their trustee. In general, an oath of party cannot either hurt or benefit third parties;(l) being, as to them, *res inter alios acta* (l. 9, § 7, l. 10, *de jurej.*, 12, 2). A tutor's oath, though it cannot bind his minor in a matter of debt, yet is effectual against him as to acts of administration done by the tutor (*Hepburn v. Hamilton*, Dec. 12, 1661, M. 8465).

Qualified oaths.

(11)

Qualities either intrinsic,

(12)

or extrinsic.

5. An oath upon reference is sometimes qualified by special limitations restricting it. The qualities which are admitted by the judge as part of the oath are called *intrinsic*; those which the judge rejects or separates from the oath, *extrinsic*. Where the quality makes a part of the allegation which is relevantly referred to oath, it is intrinsic. Thus, because a merchant suing for furnishings after the three years, must, in order to make relevancy, offer to prove by the defender's oath not only the delivery of the goods, but that the price is still due; therefore, though the defender should acknowledge upon oath his having received the goods, yet if he adds that he paid the price, this last part, being a denial that the debt subsists, is intrinsic; since it is truly the point referred to oath. Where the quality does not import an extinction of the debt, but barely a counter-claim, or *mutua petitio*, against the pursuer, it is held as extrinsic,

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(k) *Morrice v. Monro*, Dec. 2, 1829, 8 S. 156. But a creditor of the husband may prove his claim against him by reference to the wife's oath in matters as to which she is *proposita* (Inst. iii. 7, 18, note). See also the Bankruptcy Act, 19 & 20 Vict. c. 164, as to the examination of members of a bankrupt's family when there is suspicion of fraud.

(l) Therefore the Court often declines to sustain a reference where the result of the action may affect the interests of these parties (*Longworth v. Yelverton*, *supra*, p. 619).

and must be proved *aliunde*.<sup>(m)</sup> The quality of compensation is extrinsic (*Learmont v. Russell*, Dec. 9, 1664, M. 15,201), for compensation does not operate by our law *ipso jure*. A creditor in a holograph bond is not obliged, even after the vicennial prescription is elapsed, to prove that the debt still subsists, but simply that the bond was signed by the debtor (1669, c. 9); the quality of payment is therefore in this case extrinsic, and resolves into a defence, being no part of the libel referred to oath.

6. One who sues in a debt constituted neither by writing nor before witnesses, must refer not only its constitution but subsistence to the defender's oath; since the oath of the debtor, by which alone the debt can be proved, ought to be also effectual for a proof of its payment. The quality, therefore, of payment or satisfaction must in such case be intrinsic by the above-mentioned rule (*Moffat v. Moffat*, Jan. 14, 1737, M. 13,214). Yet a defender who in his oath admits the constitution of a debt, cannot get off by adjecting the quality of payment, where the payment ought by its nature to be vouched by written evidence (*Brown v. Dow*, Dec. 23, 1707, M. 13,224). The observations made upon this point apply with equal force to the case where the defence of payment is referred by the defender to the pursuer. Thus, if the creditor shall depose that the money he received was not in payment of the debt pursued for, but in consequence of a separate bargain, the quality is intrinsic, being really a denial of the point referred to oath (*Sinclair v. Sinclair*, Nov. 27, 1705, M. 13,206); but if he acknowledges that he received a sum in payment, it will not avail him though he should add that he had afterwards disbursed it on the debtor's account. In what cases is the quality of payment intrinsic. (13)

7. Oaths of verity are sometimes deferred by the judge to either party, *ex officio*; which, because they are not founded on any implied contracts between the litigants, are not finally decisive, but may be traversed on proper evidence afterwards produced; or the cause, if it has been pursued Oaths in supplement, (14)

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(m) It is of course intrinsic if the defender depone that in consideration of this counter-claim the creditor discharged the debt, or that it was at first agreed that it should be so discharged (*Dickson*, 1653 *et seq.*).

are deferred  
for supplying  
an imperfect  
proof.

before an inferior court, may be advocated, in respect the judge had no good reason to examine the party; these oaths are commonly put by the judge for supplying a lame or imperfect proof; and are therefore called oaths in supplement. There are frequent instances of them in that sort of disbursements by factors which does not easily admit of vouchers; or in furnishings by merchants, the quantity or prices of which are not fully proved by witnesses. Where the evidence brought before the judge does not amount even to a *semiplena probatio*, he ought not to take the party's oath in supplement (*Thomson v. Carnegie*, Dec. 28, 1695, M. 9373).<sup>(n)</sup>

Re-examina-  
tion of a party  
not always  
allowed.

(15)

After a party deposes upon a reference, either of his adversary or of the judge, in general terms, he cannot be re-examined upon any particular fact which may involve him in perjury (*Campbell v. Tait*, 1677, M. 9422). And, lest parties should be led into the suspicion of that crime, the Court, where special interrogatories are to be put, begin with these, and then proceed to the general one (see *Aitken v. Finlay*, 1702, M. 9423).

Oath of  
calumny

(16)

is only an oath  
of opinion;

8. To prevent groundless allegations, oaths of calumny have been introduced, by which either party may demand his adversary's oath that he believes the facts contained in his libel or defences to be just and true (1429, c. 125).<sup>(o)</sup> As this is an oath not of verity but only of opinion, the party who puts it to his adversary does not renounce other probation (*Stair* iv. 44, § 20), and therefore no party is bound to give an oath of calumny on recent facts of his own (*Act S.*, Jan. 13, 1692), for such oath is really an oath of verity.<sup>(p)</sup> Formerly parties, even after they had proved their allegations, might have been compelled to swear *de calumniâ*

cannot be put  
after a full  
proof;

<sup>(n)</sup> The use of the oath in supplement was most common in proving paternity in actions for aliment of bastards. It has disappeared in practice since parties have been admissible as witnesses. Their testimony is now weighed like that of other witnesses (*M'Bayne v. Davidson*, Feb. 10, 1860, 22 D. 738).

<sup>(o)</sup> It is in the discretion of the Court to allow the oath, and if the party refuses to take it the action is extinguished (*Paterson v. Kilgour*, July 19, 1865, 3 Macph. 1119).

<sup>(p)</sup> The declaration of a peer upon honour is equivalent to an oath of calumny (*A. S.*, Dec. 25, 1708).

(*Lord Duffus v. Monro*, Jan. 13, 1625, M. 9379), but these oaths are now confined to the cases where the proof is not yet brought, or where it is defective (*Graham v. Logie*, Dec. 22, 1699, M. 9382). They do not take place in reductions-improbations before production; for the pursuer's allegation that the writings called for are false is founded merely in a *fictio juris*, and so is not inconsistent with his belief that they are genuine (*Home v. E. Home*, 1716, M. 9383). They have not been so frequent since Act S., Feb. 1, 1715, § 6, whereby any party against whom a fact shall be alleged is obliged, without making oath, to confess or deny it; and, in case of calumnious denial, is subjected to the expense that the other party has thereby incurred.(q)

9. In all oaths, whether of verity or calumny, the citation carries, or at least implies, a certification that if the party does not appear at the day assigned for deposing he shall be held *pro confesso*; from a presumption of his consciousness that the fact upon which he declines to swear makes against him; but no party can be held *pro confesso*, if he be in the kingdom, without a previous personal citation used against him.(r) The Court of Session are in use to restore the party who offers *de recenti* to purge his contumacy upon refunding to his adversary the expense he has been put to by the delay, but no person will be restored *ex intervallo* where the adverse party is in danger of losing his other probation by the death of the witnesses, unless on the most pregnant grounds. Where one is restored *ex justitid*—e.g., because he was not legally cited—the effect of the certification is entirely taken off (*Wright v. L. Rutherford*, 1686, M. 12,036); but if he be restored *ex gratid*, and happens to die before deposing, the presumptive confession operates against

nor in reductions-improbations;

now much in disuse.

A party not comparing to depose is held *pro confesso*;

(17)

but he may be reponed, either *ex justitid* or *ex gratid*.

(q) It has fallen still more into disuse under the modern system of records and examinations of parties, and its competency has even been questioned (*Paul v. Laing*, March 9, 1855, 17 D. 604; *Paterson v. Kilgour*, July 19, 1865, 3 Macph. 1119). The oath of calumny in divorce cases is intended not to prevent groundless litigation, but collusion between the parties. It is a necessary proceeding in every process of divorce.

(r) A party who refuses to answer competent questions may also be held as confessed (*Murray v. Murray*, Feb. 12, 1839, 1 D. 484).

Oath which resolves into a *non memini*. his heir.(s) Though an oath which resolves into a *non memini* cannot be said to prove any point,(f) yet where one so deposes upon a recent fact, to which he himself is privy, his oath is considered as a dissembling of the truth, and he is held *pro confesso*, as if he had refused to swear (*Irving v. Carruthers*, Feb. 6, 1675, M. 12,031).

Oath *in litem*; (18) 10. An oath *in litem* is that which the judge defers to a pursuer for ascertaining either the quantity or the value of goods which have been taken from him by the defender without order of law, or the extent of his damages. An oath

it obtains only in cases of wrong; *in litem*, as it is the affirmation of a party in his own behalf, is only allowed where there is proof that the other party has been engaged in some illegal act,(u) e.g., in a spuilzie, or in an unwarrantable intermeddling with the pursuer's goods; or where the public policy has made it necessary, as in the case of *nautæ, caupones, stabularii* (iii 1, 11). This oath as to the quantity is not admitted where there is a concurring testimony of witnesses brought in proof of it (see *Fea v. Elphinston*, Jan. 16, 1697, M. 9367).(v)

in what cases subject to modification. When it is put as to the value of goods, it is only an oath of credulity; and therefore it has always been subject to the modification of the Lords (*Dougal v. Murdoch*, 1684, M. 9370). But as a further check upon exorbitant values that may be put by the party on his own goods, the Court has by the later practice ordained the pursuer before making oath to exhibit a special condescendence of the prices, with the grounds on which it proceeds, which they tax as they see reasonable, and then admit the oath, not exceeding such previous modification (*Man v. Campbell*, Nov. 19, 1737, M. 9371).(w)

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(s) *Grant v. McGregor*, June 20, 1839, 1 D. 1048.

(t) And in general merely leaves the fact referred open to other competent proof (Inst. § 4; Dickson 1624).

(u) *Gowanus v. Thomson*, Feb. 6, 1844, 6 D. 606.

(v) *Calder v. Calder*, Dec. 20, 1825, 4 S. 331; *Sinclair v. Sinclair*, Nov. 18, 1830, 9 S. 28.

(w) Though the oath *in litem* may still be competent, its use has to a great extent been taken away by the admission of parties as witnesses (see § 3, note f). There is this difference, that the oath *in litem* is full proof though unsupported, whereas a party's testimony must be corroborated.

11. Anciently, when writing was little used, most points might have been proved by witnesses (R. M., l. 3, c. 1, § 6, 22, 23, &c.). Even that possession which is essential to heritable rights depended on the testimony of the *pares curiæ* (ii. 3, § 15); but after writing came to be a more general accomplishment the lubricity of testimonies made it necessary to bring probation by witnesses within a narrower compass. By a constitution of Charles IX. of France, dated 1566, all contracts for sums exceeding 100 livres must be reduced into writing. The law of Scotland, though it has not carried this point so far, rejects the testimony of witnesses—(1.) In payments of any sum above £100 Scots, all which must be proved either *scripto vel juramento* by Act S., June 8, 1597.(x) (2.) In all gratuitous promises, which, though for the smallest trifle, cannot be proved by witnesses, since, as their force depends entirely on the import of the words uttered by the promiser, he may be misunderstood by inattentive hearers (*Deuchar v. Brown*, Jan. 19, 1672, M. 12,386).(y) (3.) In all contracts where writing is either essential to their constitution (iii. 2, § 2), or where it is usually adhibited, as in the borrowing of money. And it is a general rule, subject to the restrictions mentioned in the next section, that no debt or right once constituted by writing can be taken away by witnesses (l. 1, *C. de testib.*, 4, 20).

Probation by witnesses.

(19)

(20)

Rejected in payments above £100 Scots;

in gratuitous promises;

in contracts where writing is adhibited.

12. On the other part, probation by witnesses is admitted to the extent of £100 Scots in payments, nuncupative legacies, and verbal agreements which contain mutual obligations (*Anderson v. Gordon*, June 26, 1706, M. 12,234). And it is received to the highest extent—(1.) In all bargains which have known engagements(z) naturally arising from them

In what cases admitted below £100 Scots;

(20, 21)

in what cases to the highest extent.

(c) *Annand's Trs. v. Annand*, Feb. 6, 1869, 7 Macph. 526. Even in advances or payments of sums under £100 Scots (£8, 6s. 8d.) parole is probably not admissible if written acknowledgments might have been expected, or if long delay has taken place in suing for a loan.—*Per L. Deas in Annand's Trs., cit.*

(y) *Millar v. Tremamondo*, 1771, M. 12,395; Hailes 409.

(z) Innominate contracts seem not to admit of parole proof (see *Johnston v. Goodlet*, July 16, 1868, 6 Macph. 1066; Dickson on Evid. 562).

concerning moveable goods.(a) (2.) In facts performed with satisfaction even of a written obligation, where such obligation binds the party precisely to the performance of it (*Bisset v. Bisset*, Nov. 25, 1624, M. 12,358; *E. Lauderdale v. Swinton's Tenants*, Jan. 7, 1662, M. 10,023). (3.) In cases which with difficulty admit of a proof by writing, though the effect of such proof should be the extinction of the written obligation, especially if the facts import fraud or violence. Thus, a bond is reducible *ex dolo* on a proof by witnesses.(b) Lastly, all intromission by a creditor with the rents of his debtor's estate payable in grain, may be proved by witnesses (*Wishart v. Arthur*, Feb. 4, 1671, M. 99; *Thomson v. Mowbray*, Dec. 2, 1675, M. 12,370); and all intromission with the silver rent, where the creditor has entered into the total possession of the debtor's lands (*Baillie v. Menzies*, Jan. 25, 1711, M. 9990).(c)

What persons  
are rejected as  
witnesses;

(22)

near relations;

domestic  
servants;

moveable  
tenants;

13. No person whose near relation to another bars him from being a judge in his cause (1681, c. 13), can be admitted as a witness for him: but he may against him (*Monteith v. Heritors of Abbotskerse*, Nov. 24, 1709, M. 16,721); except a wife or child who cannot be compelled to give testimony against the husband or parent, *ob reverentiam personarum metum perjurii* (*Erskine v. Smith*, July 23, 1700; *Drummond v. Alexander*, eod. die, M. 16,703). Though the witness whose propinquity to one of the parties is objected to be nearly related to the other, the objection stands good (*Forbes v. Dalrymple*, 1752, M. 16,765). The testimony of domestic servants is rejected, because of their dependence on their masters; but that of handicraftsmen is admitted for those who employ them (*Erskine v. Robertson*, Feb. 26, 1685, M. 16,693). Formerly, moveable tenants—*i.e.*, tenants who had no written tacks—were disallowed, from the presumed

(a) Except in the sale and transference of ships (see Bell's Com. i.

(b) Dickson on Evid. 174 *et seq.*

(c) This is put on the ground that the debtor in such a case is not in his power to take vouchers for payments made by his tenants, and it would be hard to make them suffer for their neglect (Inst. l. c.). But this doctrine seems to be overruled by *Robertson v. Rac*, Feb. 16, 1830, 8 S. 541.

fluence of their landlords over them; but now, since that influence is much worn out, our present practice admits them (*Blackadder v. Erskine*, Jan. 15, 1735, M. 16,742).(d)

14. The testimony of infamous persons is rejected—i.e., infamous persons; persons who have been guilty of crimes that law declares to infer infamy, or who have been declared infamous by the sentence of a judge; but *infamia facti* does not disqualify a witness (*Lady Milton v. Milton*, Jan. 31, 1671, M. 12,105).(e)

Pupils are inhabile witnesses, being in the judgment of law pupils; incapable of the impression of an oath.(g) The testimony of women;

of women is always received when it is necessary—i.e., when the fact cannot be proved without them; and it is seldom admitted where other witnesses can be had (*Dunbar v. Murdoch*, Feb. 1730, M. 16,742; *Wiseman v. Wiseman*, Jan. 13, 1736, M. 16,743).(h) Near kinsman or domestic servants may, where there is a penury of witnesses arising from the nature or circumstances of the fact, be received *cum nota*; that is, their testimony, though not quite free from suspicion, is to be conjoined with the other evidence, and to have such weight given to it as the judge shall think it deserves.(i)

15. All witnesses, before they are examined in the cause, are purged of partial counsel—that is, they must declare that they have no interest in the suit, nor have given advice how

Witnesses are purged of partial counsel.  
(28, 29)

(d) All objections to the admissibility of persons as witnesses in any cause, civil or criminal, on the ground of relationship to the party introducing them, were removed by 3 & 4 Vict. c. 59, and 16 Vict. c. 20, § 3; but this Act leaves the law as to criminal cases untouched. Husband and wife are not compellable to disclose facts communicated during marriage (16 Vict. c. 20, § 4); but they are now competent witnesses in consistorial actions (37 & 38 Vict. c. 64, § 2). As to investigations in bankruptcy, see 19 & 20 Vict. c. 79, § 90, and *Savers v. Balgarnie*, Dec. 17, 1858, 21 D. 153.

(e) No one is now excluded from giving evidence by reason of having been convicted of, or suffered punishment for, crime (15 & 16 Vict. c. 27).

(g) The competency of young children is determined by the judge, after preliminary examination. Pupils are generally examined on declaration, not on oath.

(h) All restrictions on the admission of women as witnesses have long ceased; and all doubt whether they might be instrumentary witnesses has been removed by 31 & 32 Vict. c. 101.

(i) See note (d).

*Initialia  
testimonii.*

*Protestation  
for reprobator.*

*The action  
thereupon is  
admitted, not  
only before  
sentence,*

(29)

*but after it.*

*The witness  
must be made  
a party.*

to conduct it; (k) that they have got neither bribe nor promise, nor have been instructed how to depose; and that they bear no enmity to either of the parties. These, because they are the points put to a witness before his making oath, are called *initialia testimonii*. (l) Where a party can bring present proof of a witness's partial counsel in any of the above particulars, he ought to offer it before the witness be sworn; but because such objection, if it be instantly verified, will be no bar to the examination, law allows the party in that case to protest for *reprobator* before the witness is examined—*i.e.*, that he may be afterwards allowed to bring evidence of his enmity or other inability.

16. The Lords by the former practice admitted action of reprobator, (m) though no such protestation had been entered, so long as sentence was not pronounced in the principal cause, provided it could be admitted without damage to him who had cited the witnesses (*Goodin v. Murray*, July 13, 1700, M. 12,380). But by our present custom reprobators are not received unless specially protested for at the examination of the witnesses, even though he who summoned him can qualify no loss by the intermediate death of others, whom he might have brought for proof of the same facts (*Wright v. Din*, Jan. 5, 1737, M. 12,109). Reprobator is competent even after sentence where protestation is duly entered (*Cochran v. Gechin*, June 26, 1623, M. 12,099); but in that case the party insisting must consign £100 Scots, which he forfeits if he succumb (*Robertson v. White*, Dec. 3, 1635, M. 12,100). This action must have the concurrence of the King's Advocate, because the conclusion of it imports perjury; and for this reason the witness must be made a party to it (*Paterson v. Johnston*, Nov. 9, 1676, M. 12,114).

(k) No person is disqualified from being a witness by reason of interest, agency, or partial counsel (15 & 16 Vict. c. 27, and 16 Vict. c. 28).

(l) Examination *in initialibus* is not now necessary, though still competent if required by the judge or the party against whom the witness is adduced (3 & 4 Vict. c. 59, § 2).

(m) Actions of reprobator are now unknown, but incidental reprobators are still competent, though little used (*Lowrie v. Mercer*, May 28, 1840, 2 D. 959; *King v. King*, Nov. 27, 1841, 4 D. 124; *Innes v. Innes*, July 7, 1835, 13 S. 1059, aff. 2 S. & M'L. 417).

17. The interlocutory sentence or warrant by which parties are authorised to bring their proof is either by way of act or of incident diligence. In an act, the Lord Ordinary who pronounces it is no longer judge in the process; but in an incident diligence, which is commonly granted upon special points that do not exhaust the cause, the Lord Ordinary continues judge.<sup>(n)</sup> If a witness does not appear at the day fixed by the warrant of citation, a second warrant is granted of the nature of a caption, containing a command to messengers to apprehend and bring him before the Court. Where a party to whom a proof is granted brings none within the term allowed by the warrant, an interlocutor is pronounced circumducing the term, and precluding him from bringing evidence thereafter. The word *circumduce* is used nearly in the same sense in l. 73, 1, 2, *de judic.*, 5, 1. Where evidence is brought, if it be upon an act, the Lord Ordinary on Acts, after the term for proving is elapsed, declares the proof concluded, and thereupon a state of the case is prepared by the Ordinary on concluded causes, which must be judged by the whole Lords; but if the proof be taken upon an incident diligence, the import of it may be determined by the Lord Ordinary in the cause.<sup>(o)</sup>

Diligences  
against wit-  
nesses.

(30, 32)

Circumduction  
for not prov-  
ing.

(32)

Concluded  
cause.

18. Where facts do not admit a direct proof, presumptions are received as evidence, which in many cases make as convincing a proof as the direct. Presumptions are consequences deduced from facts, known or proved, which infer the certainty, or at least a strong probability, of another fact to be proved.<sup>(p)</sup> This kind of probation is therefore called

Presumptions,  
(34, 35)

(n) See next note.

(o) This distinction is obsolete; all orders for proof by a Lord Ordinary being before himself, except where issues are adjusted for jury trial, or where in special circumstances proof by commission is allowed. Proofs ordered by the Inner House must now be taken before one of the judges of the Division in which the cause depends (31 & 32 Vict. c. 100, § 62).

(p) "In presumptive evidence we arrive at the result, not so much by reasoning out the inference applicable to the facts of the particular case, as by observing that that case comes within a category of cases from which a certain inference is generally deducible" (Dickson 247). A system of presumptions is naturally elaborated as a shorthand method

*juris et de  
jure;*

*artificial*; because it requires reasoning to infer the truth of the point in question from the facts that already appear in proof. Presumptions are either—(1.) *juris et de jure*; (2.) *juris*; or (3.) *hominis* or *judicis*. The first sort obtains where statute or custom establishes the truth of any point upon a presumption; and it is so strong that it rejects all proof that may be brought to elide it in special cases. Thus, the testimony of a witness who forwardly offers himself without being cited is, from a presumption of his partiality, rejected, let his character be ever so fair; (q) and thus, also, a minor, because he is by law presumed incapable of conducting his own affairs, is, upon that presumption, disabled from acting without the consent of his curators, though he should be known to behave with the greatest prudence. Many such presumptions are fixed by statute (1592, c. 145; 1621, c. 18; 1690, c. 21, &c.).

*juris;*

(36, 37)

19. *Præsumptiones juris* are those which our law-books or decisions have established, without founding any particular consequence upon them, or statuting *super præsumpto*. Most of this kind are not proper presumptions, inferred from positive facts, but are founded merely on the want of a contrary proof. Thus the legal presumptions for freedom, for life, for innocence, &c., are in effect so many negative propositions that servitude, death, and guilt are not to be presumed without evidence brought by him who makes the allegation. All of them, whether they be of this sort or proper presumptions, as they are only conjectures formed from what commonly happens, may be elided, not only by direct evidence, but by other conjectures affording a stronger degree of probability to the contrary. *Præsumptiones hominis* or *judicis* are those which arise daily from the circum-

*judicis.*

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of arriving at a decision by judges who are accustomed to determine questions of fact without the aid of juries; and accordingly, many presumptions previously received in our law have been regarded with less favour since the introduction of jury trial in civil cases.

(q) *Ultraneousness* was abolished as an objection to witnesses in criminal matters by 9 Geo. IV. c. 29, § 10, and in all cases by 15 Vict. c. 27, § 1; leaving its effect as regards credibility to be judged of by the jury or judge.

stances of particular cases; the strength of which is to be weighed by the judge.

20. A *factio juris* differs from a presumption. Things are *Pictio juris*. presumed which are likely to be true; but a fiction of law (38) assumes for truth what is either certainly false, or at least is as probably false as true. Thus, an heir is feigned or considered in law as the same person with his ancestor; thus, also, writings against which certification is obtained in a reduction-improbation are judged to be false, *fictione juris*, though the most convincing proof shall be brought that they once existed and were genuine. Fictions of law must in all their effects be always limited to the special purposes of equity for which they were introduced (see an example, iv. 1, § 5).(7)

#### TIT. III.—OF SENTENCES AND THEIR EXECUTION.

1. Property would be most uncertain if debateable points might, after receiving a definitive judgment, be brought again in question at the pleasure of either of the parties. Every state has therefore affixed the character of *final* to certain sentences or decrees, which in the Roman law are called *res judicatæ*, and which exclude all review or re- *Res judicatæ*. hearing. (1)

2. Decrees of the Court of Session are either *in foro con-* *Decrees of the traditorio*, where both parties have litigated the cause, or *Session in foro*; in absence of the defender. Decrees of the Session *in foro* (3) cannot in the general case be again brought under review of the Court, either on points which the parties neglected to plead before sentence (which we call competent and omitted), or upon points pleaded and found insufficient (proponed and repelled; 1672, c. 16, § 19).(a) But decrees, though *in foro*, in what cases are reversable by the Court where either they labour under reducible.

(7) As to the nature of a *factio juris*, see *Kerr v. Martin*, March 6, 1840, 2 D. 752; Maine's Ancient Law, ch. ii.; Austin's Lectures on Jurisprudence, ii. 629 *et seq.* (3rd ed.).

(a) See A. S., July 23, 1674.

essential nullities—*e.g.*, where they are *ultra petita*, or not conformable to their grounds and warrants, or founded on an error *in calculo*, &c., or where the party against whom the decree is obtained has thereafter recovered evidence sufficient to overturn it, of which he knew not before (Stair, iv. 1, § 44; *Mackenzie*, § 1 h.t.).

Two consecutive interlocutors are final.

(5)

Time limited for appeals.

3. As parties might formerly reclaim against the sentences of the Session at any time before extracting the decree, no judgment was final till extract; but now a sentence of the Inner House either not reclaimed against within six sederunt days after its date (Act S., July 9, 1709), or adhered to upon a reclaiming bill, though it cannot receive execution till extract, makes the judgment final as to the Court of Session (Act S., Nov. 26, 1718). (b) And by an order of the House of Lords (March 24, 1725) no appeal is to be received by them from sentences of the Session after five years from extracting the sentence, unless the person entitled to such appeal be minor, clothed with a husband, *non compos mentis*, imprisoned, or out of the kingdom. (c) Sentences pronounced by the Lord Ordinary have the same effect if not reclaimed against as if they were pronounced in presence; and all petitions against the interlocutor of an Ordinary must be preferred within eight sederunt days after signing such interlocutor (Act S., July 9, 1709). (d)

Decrees of the Session in absence are not *res judicatae*.

(6)

4. Decrees in absence of the defender have not the force of *res judicatae* as to him; for where the defender does not appear, he cannot be said to have subjected himself by the

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(b) An Inner House judgment cannot now be reclaimed against, and there is no direct review of such a judgment except by the House of Lords.

(c) Two years from the date of the last interlocutor appealed from, or from the majority of the person appealing, or death of a person disqualified by non-age or insanity, and five years from the date of the last interlocutor appealed from in case of continued absence from the United Kingdom, is now the term limited for appeals to the House of Lords (6 Geo. IV. c. 120, § 25).

(d) The reclaiming days against Lord Ordinary's interlocutors on the merits are twenty-one days (6 Geo. IV. c. 120, §§ 5, 18; 13 & 14 Vict. c. 36, § 11). But in certain cases they are six or ten days (31 & 32 Vict. c. 100, § 28, &c.).

judicial contract which is implied in *litiscontestatio*. A party may therefore be restored against these upon paying to the other his costs in recovering them.<sup>(e)</sup> The sentences of inferior courts may be reviewed by the Court of Session before decree by advocacy<sup>(g)</sup> (i. 2, § 20), and after decree by suspension or reduction; which two last are also the methods of calling in question such decrees of the Session itself as can again be brought under the review of the Court. (7)

5. *Reduction* (iv. 1, § 5-18) is the proper remedy, either where the decree has already received full execution by payment, or where it decrees nothing to be paid or performed, but simply declares a right in favour of the pursuer. Sentences are reviewed either by reduction, (8, 18)

*Suspension* is that form of law by which the effect of a sentence-condemnatory, that has not yet received execution, is stayed or postponed till the cause be again considered. The first step towards suspension is a bill<sup>(h)</sup> preferred to the Lord Ordinary on the Bills. This bill, when the desire of it is granted, is a warrant for issuing letters of suspension, which pass the signet; but if the presenter of the bill shall not, within fourteen days after passing it, expedite the letters, execution may proceed on the sentence (Act S., July 3, 1677). Suspensions of decrees *in foro*<sup>(i)</sup> cannot pass but by the whole Lords in time of Session, and by three in vacation time; but other decrees may be suspended by any one of the judges. or suspension.

6. As suspension has the effect of staying the execution of the creditor's legal diligence, it cannot in the general case Suspensers must give caution.

(19)

(e) The effect of decrees *in foro* is given to decrees in absence after personal service of the summons on the defender, or after appearance has been entered by the defender, if the decree has not been recalled nor brought under review by suspension within sixty days after the expiry of a charge upon it (see 31 & 32 Vict. c. 101, § 24).

(g) Appeal is substituted for advocacy by 31 & 32 Vict. c. 100, §§ 64, 65, 66; see above, p. 22, note (p).

(h) Now a Note—bills and letters of suspension being abolished (1 & 2 Vict. c. 86, §§ 4, 5).

(i) The author is here speaking of decrees of the Court of Session, which are now final in that Court (6 Geo. IV. c. 120, §§ 17, 21). Suspension of decrees of inferior judges may be passed by the Lord Ordinary on the Bills (1 & 2 Vict. c. 86, § 4).

Juratory  
caution.

In what cases  
suspension  
cannot pass on  
caution.

Suspension  
when com-  
petent.

(20, 21)

The suspender  
cannot cite the  
charger upon  
his letters.

pass without caution given by the suspender to pay the debt in the event it shall be found due (see Act S., Jan. 29, 1650). Where the suspender cannot from his low or suspected circumstances procure unquestionable security, the Lords admit juratory caution—*i.e.*, such as the suspender swears is the best he can offer; *(k)* but the reasons of suspension are in that case to be considered with particular accuracy at passing the bill (Act S., Nov. 8, 1682). The nature of the obligations arising from this judicial cautionry is explained (iii. 3, § 28). Decrees in favour of the clergy, of universities, hospitals, or parish schoolmasters, for their stipends, rents, or salaries, cannot be suspended but upon production of discharges, or on consignment of the sums charged for (1669, c. 6; 1696, c. 14). A charger who thinks himself secure without a cautioner, and wants despatch, may, where a suspension of his diligence is sought, apply to the Court to get the reasons of suspension summarily discussed on the bill.

7. Though he in whose favour the decree suspended is pronounced be always called the charger, yet a decree may be suspended before a charge be given on it. Nay, suspension is competent, even where there is no decree, for putting a stop to any illegal act whatsoever. Thus, a building, or the exercise of a power which one assumes unwarrantably, is a proper subject of suspension. *(l)* Letters of suspension bear the form of a summons, which contains a warrant to cite the charger; and it is likely that they were anciently used by way of summonses; *(n)* but they have now of a long time

*(k)* It used to be necessary to find caution for expenses in all advocations of inferior court judgments, but this is no longer required (31 & 32 Vict. c. 100, § 65).

*(l)* The remedy is here by suspension and interdict for the preservation of the existing state of possession; but it cannot be used against a completed operation. By 31 & 32 Vict. c. 100, § 89, where an act which might have been prevented by interdict has been performed, even before an application in the Bill Chamber, the respondent may be ordered to do whatever is necessary to reinstating the complainer in his possessory right, or for granting specific relief.

*(n)* The forms in suspensions have been entirely altered by 1 & 2 Vict. c. 86, and other Acts. What is here said as to the nature of the decree remains true.

been considered merely as a prohibitory diligence; so that the suspender, if he would turn provoker, must bring his action of reduction in common form, as was found in a suspension of the election of a magistracy (*Mags. of Edinburgh*, Feb. 7722, n.r.). If upon discussing the letters of suspension the reasons shall be sustained, a decree is pronounced suspending the letters of diligence on which the charge was given *simpliciter*; which is commonly called a decree of suspension, and has the same force with a reduction, as it takes off the effect of the decree suspended to perpetuity. If the reasons of suspension be repelled, the Court find the letters of diligence orderly proceeded—i.e., regularly carried on; and they ordain them to be put to further execution.

Decree of suspension.

Decree finding the letters orderly proceeded.

8. Decrees are carried into execution by diligence, either against the person or against the estate of the debtor. The first step of personal execution was anciently by letters, passing the signet, which we called Letters of Four Forms; because the debtor was thereby charged to make payment four times successively, each charge upon three days. By the fourth he was charged either to pay the debt or to enter himself into a prison, specified in the letters; and if he did neither within the days of the charge, the messenger was directed to denounce him rebel; which severity was thought justifiable, because the debtor might have prevented it by entering into prison. Letters of horning were not authorised to pass upon liquid debts till 1584, c. 139; but letters of four forms appear to have also continued in use till the year 1613 (see Spottiswoode, Pr. 149, 150). Before horning could pass on the decree of an inferior judge, the decree was by our former practice to have been judicially produced before the Session, and their authority interposed to it by a new decree; which, because it was made out in the precise terms of the other, was called a decree-conform; but now letters of horning may be granted by warrant of the Court without the necessity of a decree-conform; on the decrees of magistrates of boroughs, sheriffs, admirals, and commissaries (1593, c. 177; 1606, c. 10; 1609, c. 15; 1612, c. 7). Letters of horning were sometimes directed against all and sundry, without any previous decree or even citation (*Stair*, iv. 3,

(9-11)

The execution of decrees personal; by letters of four forms,

and by letters of horning.

Decree-conform.

§ 25), as letters against parishioners for building churchyard dykes (in consequence of 1597, c. 232), or against the heritor of a parish for the payment of stipend. These general letters were declared by 1592, c. 140, to be no foundation for denouncing any person who was not previously cited to hear and see the letters directed against him; and now (by 1690, c. 13) no general letters can issue, except for the King's revenue, or ministers' stipends, or upon poindings of the ground.<sup>(o)</sup>

General letters  
of horning  
discharged.

(12, 13) 9. If the debtor does not obey the will of the letters of horning within the days of the charge (ii. 5, § 24), the charger, after denouncing him rebel and registering the horning (ii. 5, § 25, 26), may apply for letters of caption, which contain a command not only to messengers but to magistrates to apprehend and imprison the debtor.<sup>(p)</sup> All messengers and magistrates who refuse their assistance in executing the caption are liable *subsidiarie* for the debt; and such subsidiary action is supported by the execution of the messenger employed by the creditor expressing that they were charged to concur and would not. By magistrates are understood only such as the law obliges to have sufficient prisons, as sheriffs, stewards, bailies of subsisting boroughs of regality, or magistrates of royal boroughs. Hence a bailie of a borough of barony cannot be charged to execute a caption (*Bailies of Dunse v. Mudie's Crs.*, March 13, 1623, M. 11,691). Letters of caption cannot express warrant to the messenger, in case he cannot get access, to break open all doors and other lockfast places where he is to search.<sup>(q)</sup>

Letters of  
caption.

Concurrence of  
messengers  
and magis-  
trates.

10. Law secures peers<sup>(r)</sup> and married women<sup>(s)</sup> against

<sup>(o)</sup> The opinion of Bankton, iv. 37, 10, mentioned in the Inst. l. c., that this exception is extended to Universities in collecting their rents, is negated by *Pollok v. Univ. of Glasgow*, June 19, 1865, 3 Macph. 968.

<sup>(p)</sup> Imprisonment for debt is abolished by 43 & 44 Vict. c. 34, except in cases of non-payment of taxes and aliment.

<sup>(q)</sup> This warrant forms part of the writ under 1 & 2 Vict. c. 114.

<sup>(r)</sup> And their widows (*M'Donald*, July 29, 1756, M. 10,031); also members of the House of Commons during the sitting of Parliament, and for forty days before and after each prorogation and before next meeting (see Bell's Com. ii. 569). But a member becoming bankrupt and remaining so for twelve months forfeits his seat.

<sup>(s)</sup> Unless where the husband is abroad and the wife is carrying on a

personal execution by caption upon civil debts. Pupils are secured by special statute (1696, c. 41).<sup>(t)</sup> No caption can be executed against a debtor within the precincts of the King's palace of Holyroodhouse.<sup>(u)</sup> But this privilege of sanctuary afforded no security to criminals, as that did which was by the canon law conferred on churches and religious houses. The King's castles are not entitled to this privilege (*Belshes v. Coran and Kinloch*, 1751, M. 8890). Where the personal presence of a debtor under caption is necessary in any of our supreme courts, the judges are empowered to grant him a protection for such time as may be sufficient for his coming and going, not exceeding a month (1681, c. 9; 1698, c. 22.<sup>(x)</sup>)

What persons secured against caption.

(25)

Privilege of sanctuary.

Protection against caption.

11. After a debtor is imprisoned, he ought not to be indulged the benefit of the air, not even under a guard; for creditors have an interest that their debtors be kept under close confinement, that by the *squalor carceris* they may be brought to pay their debt.<sup>(y)</sup> And any magistrate or jailor who shall suffer the prisoner to go abroad without a proper attestation upon oath of the dangerous state of his health, is liable *subsidiarie* for the debt by Act S., June 14, 1671. Magistrates are in like manner liable if they shall suffer a prisoner to escape through the insufficiency of their prison

Prisoners must be closely confined.

(14, 15)

Magistrates when liable *subsidiarie* for the debt.

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separate trade, or where she has an order of protection under the Con-jugal Rights Act, 24 & 25 Vict. c. 86, §§ 1-6.

(t) *Supra*, note (p).

(u) Nor against a bankrupt who has obtained a warrant of protection under the Bankruptcy Act (19 & 20 Vict. c. 79, § 44).

(x) And the sheriff may grant warrant to bring the debtor from the sanctuary for examination as a bankrupt, which operates as a protection in going and returning (19 & 20 Vict. c. 79, § 88).

(y) This strictness has been greatly relaxed (see. Bell's Com. ii. 548). "In all cases of new prisons, airing grounds are provided within which the prisoners may take exercise. On presenting what is called a sick-bill, and satisfying the Court that his health is suffering from the imprisonment, a prisoner is entitled, under the Act of Sederunt, 14th June, 1671, to liberation from prison, the magistrates giving him liberty to reside in some house within the town during the continuance of his sickness, they being always answerable that the party escape not, and upon his recovery return to prison."—MOIR.

Form of liber-  
ating a  
prisoner.

(Act S., Feb. 11, 1671).<sup>(z)</sup> But if he shall escape under night, by the use of instruments, or by open force, or by any other accident which cannot be imputed to the magistrates or jailor, they are not chargeable with the debt, provided they shall have, immediately after his escape, made all possible search for him. Regularly, no prisoner for debt upon letters of caption, though he should have made payment, could be released without letters of suspension containing a charge to the jailor to set him at liberty; because the creditor's discharge could not take off the penalty incurred by the debtor for contempt of the King's authority. But to save unnecessary expense to debtors in small debts, jailors are (by Act S., Feb. 5, 1675) empowered to let go prisoners where the debt does not exceed 200 merks Scots, upon production of a discharge in which the creditor consents to his release (see Act S., July 18, 1750).<sup>(a)</sup>

Liberation  
upon *cessio*  
*bonorum*

(26)

must proceed  
on the  
prisoner's  
oath;

12. Our law, from a consideration of compassion, allows insolvent debtors to apply for a release from prison upon a *cessio bonorum*—i.e., upon their making over to the creditors all their estate, real and personal. This must be insisted for by way of action, to which all the creditors of the prisoner ought to be made parties. The prisoner must in this action, which is cognisable only by the Court of Session,<sup>(b)</sup> exhibit a particular inventory of his estate, and make oath that he has no other estate than is therein contained, and that he has made no conveyance of any part of it since his imprisonment, to the hurt of his creditors. He must also make oath

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<sup>(z)</sup> Magistrates of burghs are not liable in their corporate character for the safe custody of prisoners since 2 & 3 Vict. c. 42. The management of prisons is now regulated by 40 & 41 Vict. c. 53.

<sup>(a)</sup> By the existing practice, if a debtor can pay his debt as it stands in the prison record, he is free (Bell's Com. ii. 545). But see p. 638, note (p).

<sup>(b)</sup> Jurisdiction in cases of *cessio bonorum* was given to sheriffs by 6 & 7 Will. IV. c. 56 (*Cessio Act*), even in regard to foreign creditors (*Kennedy v. Ker*, March 10, 1838, 16 S. 990). The statute provides for the debtor lodging a state of his affairs and all his books and papers in the hands of the clerk, together with a copy of the *Gazette* intimating his application.

whether he has granted any disposition of his effects before his imprisonment, and condescend on the person to whom, and on the cause of granting it, that the Court may judge whether by any collusive practice he has forfeited his claim to liberty (Act S., Dec. 1685, and Feb. 8, 1688).(c)

13. A fraudulent bankrupt is not allowed this privilege; nor a criminal who is liable in an assythment or indemnification to the party injured, or his executors, though the crime itself should be extinguished by a pardon (*Malloch, petr.*, 1751, M. 11,774).(d) A disposition granted on a *cessio bonorum* (e) is merely in further security to the creditors, not in satisfaction or *in solutum* of the debts. If, therefore, the debtor shall acquire any estate after his release, such estate may be attached by his creditors as if there had been no *cessio*, except in so far as is necessary for his subsistence (l. 4, *pr. de cess. bon.*, 42, 3; Q. Att., c. 7, § 3). Debtors who are set free on a *cessio bonorum* are obliged to wear a habit proper to dyvours or bankrupts. The Lords are, by 1696, c. 5, prohibited to dispense with this mark of ignominy, unless in the summons and process of *cessio* it be libelled, sustained, and proved that the bankruptcy proceeds from misfortune. And bankrupts are condemned to submit to the habit, even where no suspicion of fraud lies against them, if they have been dealers in an illicit trade.(f)

it is not competent to delinquents.

(27)

Dyvour's habit.

14. Where a prisoner for debt declares upon oath, before the magistrate of the jurisdiction, that he has not wherewith to maintain himself, the magistrate may, by 1696, c. 32, set him at liberty, if the creditor in consequence of whose diligence he was imprisoned does not aliment him within ten

Indigent prisoners must either be alimented or liberated on the Act of Grace.

(28)

(c) The procedure in *cessio* is now regulated by 6 & 7 Will. IV. c. 56; 39 & 40 Vict. c. 70, § 26; and 43 & 44 Vict. c. 34, §§ 7-9.

(d) After considerable fluctuation, it seems settled that a person imprisoned for damages or penalties due to private persons may sue a *cessio* (Bell's Com. ii. 583; *Kerr*, May 16, 1837, 15 S. 928).

(e) A disposition by the debtor seems still to be necessary, though by the Act referred to the decree of *cessio* itself operates as an assignment of the debtor's moveables.

(f) The dyvour's habit, previously dispensed with in practice, is now abolished by the *Cessio* Act, § 18.

days after intimation made for that purpose.(g) But the magistrate may in such case detain him in prison if he chooses to bear the burden of the aliment rather than release him (*Grierson v. Magistrates of Dumfries*, Feb. 20, 1713, M. 11,805).(h) This statute, which is usually called *the Act of Grace*, is limited to the case of prisoners for civil debts.(i) No prisoner, therefore, can claim the benefit of it who is committed, either for not performing a fact in his own power (*Turner v. Ross*, Dec. 2, 1709, M. 11,802), or for not paying a fine or damages arising *ex delicto* (*Maclesly, petr.*, Nov. 23, 1738, M. 11,810).(j)

Execution  
against the  
debtor's  
estate.

(16, 17)

(iii. 6, 25)

Letters of  
open doors.

15. Decrees are executed against the moveable estate of the debtor by arrestment or poinding (iii. 6); and against his heritable estate by inhibition (ii. 11) or adjudication (ii. 12). Letters of poinding, as well as of horning, may be issued by warrant of the Court of Session on the decrees of inferior judges (1661, c. 29; iii. 6). A messenger employed in poinding, if he has not also letters of caption along with him, has no power to break open doors; but if he returns an execution that access was denied him, letters will be issued of course, giving him that power, which are called letters of open doors. If one be condemned, in a removing or other process, to quit the possession of lands, and refuses, notwith-

(g) A deposit of 10s. is now required from the incarcerating creditor before the debtor is lodged in jail (6 Geo. IV. c. 62, § 1).

(h) This is not now law (*Boyd v. Ponton*, Dec. 21, 1811, F.C.).

(i) Or arrested as *in meditatione fugæ* (*Smith*, Jan. 18, 1766, M. 11,816).

(j) "As to the latter point, a different view was afterwards taken, recognising the line of distinction between prisoners to be alimented from the public funds, such as the case of crimes for which imprisonment was the punishment, and those confined at the instance and for the interest of an individual. And it is now fixed that parties imprisoned for fines or penalties, payable merely to a private party, are entitled, so far as these are concerned, to the benefit of aliment under the Act of Grace; while, in so far as regards a fine payable to the public prosecutor as representing the public interest, they have no such claim (*Clark v. Johnstone*, 1787, M. 11,818). It seems to be still an open question whether a Crown debtor, imprisoned for debt or taxes due to the Crown, is entitled to the benefit of the Act of Grace (see the subject discussed in the case of *Pool v. Irving*, Dec. 17, 1831, 10 S. 152)."

—MOIR. *Adm.-Gen. v. Magistrates of Inverness*, Jan. 29, 1856, 18 D. 366.

standing a charge, letters of ejection are granted of course, Letters of ejection. ordaining the sheriff to eject him, and to enter the obtainer of the decree into possession (ii. 6. 20 *et seq.*). Where the party still continued to possess in spite of law, the Scots Privy Council, while that Court subsisted, granted letters of fire and sword, authorising the sheriff to dispossess him by all the methods of force; but by our present practice, where one opposes by violence the execution of a decree, or of any lawful diligence which the civil magistrate is not able by himself and his officers to make good, the execution is enforced *manu militari*.

16. A *decree-arbitral*, which is a sentence proceeding on a submission to arbiters, has some affinity with a judicial sentence, though in most respects the two differ. A *sub-* Decree-arbitral. (29) *mission* is a contract entered into by two or more parties Submission. who have disputable rights or claims, whereby they refer the differences to the final determination of an arbiter or arbiters, and oblige themselves to acquiesce in what shall be decided. Where there are two or more arbiters, an *oversman* is com- Oversman. monly named in the submission, to whom power is given to determine in case the arbiters cannot agree in the sentence; and sometimes the nomination of the oversman is left to the arbiters. But in either case the oversman has no power to decide unless the arbiters differ in opinion, for the power of decision is given in the first place to them (*Gordon v. Abernethy*, 1716, M. 655). Where the day within which the arbiters are to decide is left blank in the submission, practice has limited the arbiters' power of deciding to a year.<sup>(k)</sup> As this has proceeded from the ordinary words of style, empowering the arbiters to determine betwixt and the day of next to come, therefore, where a submission is indefinite, without specifying any time, it ought, like all other contracts or obligations, to subsist for forty years.<sup>(l)</sup> And, on this ground, a bond obliging the granter to submit debateable claims to certain<sup>(m)</sup> persons is perpetual, and productive of

How long submissions are obligatory.

(k) Unless power is given to the arbiters to prorogate, or the parties prorogate directly or indirectly (*Paul*, March 15, 1867, 5 Macph. 613).

(l) *Fleming v. Wilson and M'Lellan*, July 7, 1827, 5 S. 841.

(m) The submission must be to arbiters named. It is not sufficient

an action at any time within the years of prescription (*Hay v. E. Eglinton*, Feb. 25, 1630, M. 637; *Boswell v. Lindsay*, Feb. 3, 1699, M. 9152). Submissions, like mandates, expire by the death of any of the parties submitters (see *Hay*, Feb. 25, 1630, *supra*).

Can arbiters  
be compelled  
to decide?

(30, 31)

17. Formerly arbiters who had accepted a submission might have been compelled by letters of horning to pronounce sentence; which proceeded from the style in which submissions were then executed; by which not only the parties, but the arbiters, consented to the registration of the submission, in order to diligence. As this part of style is now disused, it may be doubted whether an arbiter who has accepted the office may, like a mandatary, throw it up at pleasure (see *Chiesly v. Calderwood*, June 30, 1699, M. 632; and I. 3, § 1, *de recept. qui.*, 4, 8). This is certain, that he cannot now be compelled by summary diligence to decide.<sup>(n)</sup>

Arbiters can-  
not grant  
warrant for  
citing wit-  
nesses,

As arbiters are not vested with jurisdiction, they cannot compel witnesses to make oath before them; or havers of writings to exhibit them;<sup>(o)</sup> but this defect is supplied by the Court of Session, who, at the suit of the arbiters (*Ker v. Scott*, Jan. 6, 1670, M. 634), or of either of the parties (*Stevenson v. Young*, June 26, 1696, M. 634), will grant warrant for citing witnesses, or for the exhibition of writings. For the same reason, the power of arbiters is barely to decide; the execution of the decree belongs to the judge. Where the submitters consent to the registration of the decree-arbitral, performance may be enforced by summary diligence.

nor execute  
their own  
sentences.

They cannot  
exceed the  
powers given  
to them.

(32, 33)

18. The power of arbiters is wholly derived from the consent of parties. Hence, where their powers are limited to a certain day, they cannot pronounce sentence after that day; though they may, *in ipso termino*—i.e., on the very day betwixt and which the parties empowered them to decide (*Wilson v. Haddo*, June 30, 1694, M. 647). Nor can they

that it be to the holder of an office. The case is different where the subscription is ancillary to a contract, and intended to aid in carrying it out.

(n) But an arbiter accepting is bound to complete his duty under the submission, and may be compelled to do so (*Marshall v. Edin. and Glas. Rail. Co.*, March 26, 1853, 15 D. 603).

(o) Except under the Railway Companies Arbitration Act, 1869, 22 & 23 Vict. c. 59.

subject parties to a penalty higher than that which they have agreed to in the submission (*Grosat v. Cunningham*, Jan. 24, 1739, M. 626). And where a submission is limited to special claims, sentence pronounced on subjects not specified in the submission is null, as being *ultra vires compromissi*.(p)

19. But, on the other part, as submissions are designed for a most favourable purpose (the amicable composing of differences), the powers thereby conferred on arbiters receive an ample interpretation. For this reason, a general submission of all questions and claims between the parties imports a power to the arbiters to decide upon claims, not only of moveable, but of heritable bonds (*Kincaid v. Aikenhead*, Dec. 15, 1631, M. 5064). Hence, also, where arbiters in a special submission decree mutual general discharges to be granted *hinc inde*, the decree is nevertheless valid in as far as it relates to the claims specified in the submission; and the effect of the general discharge is, by a favourable interpretation, restricted to these claims (*Crawford v. Hamilton*, Dec. 25, 1702, M. 6835). In like manner, though by the Roman law a decree-arbitral which decided only part of the claims submitted, and left the rest open, was null (l. 19, § 1, *de recept. qui.*, 4, 8), such partial decree is effectual by our customs (*Stark v. Thumb*, March 20, 1630, M. 6834).(q) Yet to prevent cavilling, that power, where it is intended to be given to arbiters, is by the present style specially expressed in the submission. Where the submitters have mutual claims against one another, a decree-arbitral which determines only those on one part, and leaves all on the other undetermined, is null (*Wishart v. Falconer*, June 30, 1625, M. 17,013); for it can in no case be presumed to be the meaning of parties that one of them shall have the benefit of a final decision on the claims competent to him, while the other is left to make good all his by a law-suit.

The powers of arbiters are amply interpreted.

(p) Unless parties by their conduct have enlarged the scope of the submission (*North Brit. Rail. Co. v. Barr & Co.*, Nov. 27, 1855, 18 D. 102).

(q) On the contrary, it seems to be the law that a decree-arbitral is not valid unless it exhausts the submission, where there is no power expressed to give partial awards (see *Lyle v. Lyle*, Dec. 2, 1842, 5 D. 236; Bell on Arbitration, b. iii. c. 10).

Decrees-arbitral not reducible on iniquity.

(35)

20. Our more ancient law, by which decrees-arbitral might be reduced on the iniquity of the sentence, or enormous prejudice of the party, defeated the principal design of submissions—viz., the cutting off law-suits; and was hardly reconcilable to the express compact of the submitters, by which they agree to acquiesce in the decision of the arbiter (l. 27, § 2, *de recept. qui*, 4, 8). But by the Regulations 1695, § 25, decrees-arbitral are declared not reducible upon any ground except corruption, bribery, or falsehood.

#### TIT. IV.—OF CRIMES.

Crimes :

(2)'

public,

and private.

1. The word *crime*, in its most general sense, includes every breach either of the law of God or of our country. In a more restricted meaning, it signifies such transgressions of law as are punishable by courts of justice. Crimes were by the Roman law divided into Public and Private. Public crimes were those that were expressly declared such by some law or constitution (l. 1, *de publ. judic.*, 48, 1), and which, on account of their more atrocious nature and hurtful consequences, might be prosecuted by any member of the community (§ 1, *Inst. eod. t.*, 4, 18). Private crimes could be pursued only by the party injured, and were generally punished by a pecuniary fine, to be applied to his use.(a) By

(a) "But this division of crimes is not received in our practice" (*Inst. l. c.*). This notice of crimes is so fragmentary that it may be suggestive to give the classification adopted in the Indian Penal Code. Besides abetment of, or accession to, crime, the code treats of the following groups :—Offences against the State ; relating to the army and navy ; against the public tranquillity ; by or relating to public servants ; contempts of the lawful authority of public servants ; false evidence and offences against public justice ; offences relating to coin and Government stamps ; relating to weights and measures ; affecting the public health, safety, conveniency, decency, and morals ; relating to religion ; affecting the human body ; against property ; relating to documents, and to trade or property marks ; the criminal breach of contracts of service ; offences relating to marriage ; defamation ; criminal intimidation, insult, and annoyance ; attempts to commit offences. The principal Scottish authorities on the subject are Hume, Alison, and Macdonald.

the law of Scotland, no private party, except the person injured or his next of kin, can accuse criminally.(b) But the King's Advocate, who in this question represents the community, has a right to prosecute all crimes *in vindictam publicam*, though the party injured should refuse to concur.(c) Smaller offences, as petty riots, injuries, &c., which do not demand the public vengeance, pass generally by the appellation of *delicts*, and are punishable only by a small pecuniary mulct, or perhaps by a short imprisonment.

2. It is of the essence of a crime that there be an intention in the actor to commit it;(d) for an action in which the will of an agent has no part is not a proper object either of rewards or punishments. Hence arises the rule *crimen dolo contrahitur*. Simple negligence does not therefore constitute a proper crime (l. 7, *ad leg. Corn. de sicar.*, 48, 8). Yet where it is extremely gross, it may be punished arbitrarily or *extra ordinem* (see l. 11, *de incend. ruin. naufr.*, 47, 9).(e) Far less can we reckon in the number of crimes

Dolo is essential to crimes;

(5)

yet negligence is in some cases punishable.

Involuntary actions.

(b) It is not fatal to such a prosecution that the injured party declines to prosecute, or that there are nearer relatives than the prosecutor, and that they do not join in the prosecution (see Hume, ii. 124). The concurrence of the Lord Advocate, which can only be withheld on good cause shown, is required in all cases of private prosecution, except where the right to prosecute is especially conferred upon individuals by statute. See the law on this subject discussed in *Mackintosh*, Nov. 4, 1872, 45 S. J. 51.

(c) The Lord Advocate is the principal public prosecutor in Scotland, and the only competent one in the Supreme Court. In the inferior Courts the public prosecutor is denominated Procurator-fiscal.

(d) It is essential to the criminality of an act that it has been prompted by a corrupt and evil intention; but it is immaterial whether the sufferer be the person whom it was intended to injure or another. See Hume on Crimes, c. 1.

(e) As a general rule, mere neglect of duty, not resulting in injury, is not by our law a relevant article of dittay; but there are exceptions, both under special statutes and at common law. Thus, at common law, persons in public offices are responsible for neglect and violation of duty, though no injury has resulted to the public service therefrom; and furious driving or riding in a public place is in itself an offence. The degree of care and caution which the law requires in order to excuse from punishment for an injury resulting from the act done or omitted depends on the circumstances of each particular case, and no general rule can be laid down.

Actions committed by idiots.

(7)

Actions committed in drunkenness.

Infants cannot commit crimes.

(6)

Can pupils commit them?

Accessories, or art and part;

(10)

involuntary actions, the first cause of which is not in the agent, as those committed by an idiot or furious person.(f) But lesser degrees of fatuity, which only darken reason, will not afford a total defence, though they may save from the *pœna ordinaria*.(g) Actions committed in drunkenness are not, as to this question, to be considered as involuntary, seeing the drunkenness itself, which was the first cause of the action, is both voluntary and criminal.

3. On the same principle, such as are in a state of infancy, or in the confines of it, are incapable of a criminal action—dole not being incident to that age (l. 12, *ad leg. Corn. de sicar.*, 48, 8). The Roman law asserts, in general, that crimes are not imputable to pupils (l. 22, *pr. ad leg. Corn. de fals.*, 48, 10); but the precise age at which a person becomes capable of dole, being fixed neither by nature nor by statute, is by our practice to be gathered by the judge, as he best can, from the understanding and manners of the person accused. Where the guilt of a crime arises chiefly from statute, the actor, if he is under puberty, can hardly be found guilty; but where nature itself points out its deformity, he may, if he is *proximus pubertati*, be more easily presumed capable of committing it. Yet even in that case he will not be punished *pœna ordinaria*.(h)

4. One may be guilty of a crime, not only by perpetrating it himself, but by being accessory to a crime committed by another; which last is by civilians styled *ope et consilio* (l. 50, § 3, *de furt.*, 47, 2), and, in our law phrase, *art and part*. A person may be guilty art and part, either—(1) by

(f) The charges of Lord Justice-Clerk Hope in the cases of *Gibson*, H.C., Dec. 23, 1844, 2 Broun 355, and of *Smith and Campbell*, H.C., Jan. 17, 1855, 2 Irv. 1, and that of Lord Justice-Clerk Inglis in the case of *Milne*, H.C., Feb. 11, 1863, 4 Irv. 343, may be referred to as containing most instructive statements of the principles applicable to the plea of insanity in criminal cases. See Hume, i. 37-45; Macdonald, 14-16; 20 & 21 Vict. c. 71, §§ 87, 88.

(g) See cases of *William Braid*, March 12, 1835, Bell's Notes 5, and *Thomas Henderson*, March 13, 1835, *ibid*.

(h) Children over seven years of age are held capable of committing crime, but probably up to puberty are not liable to capital punishment. See Hume, i. 34-35.

giving advice or counsel to commit the crime; or (2) by giving warrant or mandate to commit it; or (3) by actually assisting the criminal in the execution. A bare advice does by advice; not seem by the Roman law to have inferred guilt (l. 36, (12) *pr. de furt.*, 47, 2), contrary to the practice of most other nations. It is generally agreed by doctors that in the more atrocious crimes the adviser is equally punishable with the criminal; and that, in the slighter, the circumstances arising from the adviser's lesser age, the jocular or careless manner of giving advice, &c., may be received as pleas for softening the punishment. One who gives a mandate to mandate; commit a crime, as he is the first spring of action, seems (11) more guilty than the person employed as the instrument in executing it; yet the actor cannot excuse himself under the pretence of orders which he ought not to have obeyed.<sup>(i)</sup> How far the commands of a superior may in certain cases either free entirely from punishment, or mitigate it, is explained by Mackenzie, *Crim. Treat.*, tit. "Art and Part," § 5, 6.<sup>(j)</sup>

5. Assistance may be given to the committer of a crime, or assistance. not only in the actual execution, but previous to it, by furnishing him with poison, arms, or the other means of perpetrating it; but if he who thus assists had no reason to believe that these instruments were intended for a criminal purpose, no guilt can be inferred against him. That sort of assistance which is not given till after the criminal act, and which is commonly called abetting, though it be of itself criminal, does not infer art and part of the principal crime; as if one should favour the escape of a criminal, knowing him to be such, or conceal him from justice. But if, previously to the commission of the crime, one should promise protection to the criminal, it will involve both in equal guilt; for nothing can be a stronger incitement to crimes (13)

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(i) The mandant is responsible for the natural or probable consequences of the act done under his orders. Thus, if a person instigates a surgeon to attempt to procure abortion, the instigator is guilty. See *Reid*, Nov. 11, 1858, 3 *Irv.* 235. See also 1 *Hume* 280.

(j) See *Hume*, i. 47, and *Alison*, i. 668-675.

than the assurance of being screened or protected from punishment.

Crimes  
punished  
capitally.

(15)

Arbitrary  
punishment  
never extended  
to death.

6. Those crimes that are in their consequences most hurtful to society are punished capitally, or by death; others escape with a lesser punishment, sometimes fixed by statute, and sometimes arbitrary, *i.e.*, left to the discretion of the judge, who may exercise his jurisdiction either by fine, imprisonment, or a corporal punishment.<sup>(k)</sup> Where the punishment is left by law to the discretion of the judge, he can in no case extend it to death; for where the law intends to punish capitally it says so in express words, and leaves no liberty to the judge to modify. But where in any of our ancient laws (*Leg. Burg.*, c. 132; 1457, c. 77, &c.) the life of the offender is put in the mercy or will of the King, it is probable that the judge, in place of pronouncing sentence himself, left it to the Sovereign, who inflicted sometimes a capital, and sometimes a lesser punishment on the person guilty, according to his demerit. The single escheat of the criminal falls on conviction in all capital trials, though the sentence should not express it; for if the bare non-appearance in a criminal prosecution draws his forfeiture after it (ii. 5. § 26, 27), much more ought the being convicted of a capital crime to infer it.

Capital crimes  
infer single  
escheat.

(16)

Blasphemy.

(17)

7. Certain crimes are committed more immediately against God Himself; others, against the state; and a third kind, against particular persons. The chief crime in the first class cognisable by temporal courts is blasphemy; under which may be included atheism. This crime consists in the denying or vilifying the Deity by speech or writing. Blasphemers were punished capitally both by the Jewish law (*Lev. xxiv. 16*) and by the Roman (*Nov. 77*). All who curse God, or any of the Persons of the blessed Trinity, are by our law (1661, c. 21) to suffer death, even for a single act; and those who deny Him, if they persist in their denial. This Act is ratified by 1695, c. 11, which also makes the denial of a Providence, or of the authority of the Holy

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(k) Or penal servitude (16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47; see also 32 & 33 Vict. c. 99).

Scriptures, criminal; and punishable capitally for the third offence.<sup>(l)</sup>

8. All persons who used witchcraft, sorcery, or necromancy, or pretended skill therein, and all consulters of witches, were punished by death (1563, c. 73). But by Act 9 Geo. II. c. 5, no prosecution can be carried on for witchcraft or conjuration; and by the same Act all who undertake from their skill in any occult science to tell fortunes, or discover stolen goods, are to suffer imprisonment for a year, stand in the pillory four times in that year,<sup>(m)</sup> and find surety for their future good behaviour. Withcraft. (18)  
Telling fortunes.

9. Some crimes against the state are levelled directly against the supreme power, and strike at the constitution itself; others discover such a contempt of law as tends to baffle authority, or slacken the reins of government. Treason, *crimen majestatis*, is that crime which is aimed against the majesty of the state; and can be committed only by those who are subjects of that state either by birth or residence. It was high treason by the law of Scotland to intend the King's death, to lay any restraint upon his person, or to entice any foreign power to invade his dominions (1662, c. 2), and to rise in arms, maintain forts, or make treaties with foreign states without his authority (1661, c. 5). Certain facts, though not in their nature treasonable, were declared by statute to be punishable as treason—viz, theft by landed men (1587, c. 50); murder under trust (*ibid.* c. 51); wilfully setting fire to coal-heughs (1592, c. 146), or to houses or corns (1528, c. 8); and assassination (1681, c. 15). Treason was punished by death, and by the forfeiture to the King of the traitor's estate, both real and personal. But this forfeiture did not cut off the right of the creditors, tacksmen, superiors, vassals, heirs of entail, or widows, of Treason, (19-27)  
by the law of Scotland.  
Statutory treason.

(l) Though the statutes mentioned in the text have been repealed, blasphemy is still an offence, its punishment being imprisonment or fine, or both, at the discretion of the Court (6 Geo. IV. c. 47, as amended by 7 Will. IV. & 1 Vict. c. 5; see *Paterson*, Nov. 8, 1843, 1 Broun 629; *Robinson*, July 24, and Nov. 4, 1843, 1 Broun 590, 643).

(m) The punishment of the pillory was abolished by 7 Will. IV. & 1 Vict. c. 23.

the forfeiting persons (1690, c. 33). Treason might by our law have been tried after the death of the traitor, and sentence condemnatory upon such trial carried the estate to the Crown (1540, c. 69); which was indeed agreeable to the *jus novum* of the Romans (*l. 8. pr. C. ad leg. Jul. Maj.*, 9, 8); but contrary to the rules of law and the dictates of humanity.

English laws of  
treason made  
ours.

10. Soon after the Union of the two kingdoms, in 1707, the laws of treason then in force in England were made ours by 7 Anne, c. 21, both with regard to the facts constituting that crime, to the forms of trial, the corruption of blood, and all the penalties and forfeitures consequent on it. By this Act the facts that inferred statutory treason by our former law are declared simply capital crimes.

Treason what,  
by the laws of  
England.

11. It is high treason, by 25 Edw. III. st. 5, c. 2, to imagine the death of the King, Queen, Consort, or of the heir-apparent of the Crown; to levy war against the King, or adhere to his enemies; to counterfeit the King's coin, or his Great or Privy Seal; to kill the chancellor, treasurer, or any of the twelve judges of England, while they are doing their offices; which last article is by the forenamed Act 7 Anne applied to Scotland in the case of slaying any judge of the Session or of Justiciary sitting in judgment. Those who wash, clip, or lighten the proper money of the realm (5 Eliz. c. 11; 18 Eliz. c. 1); (n) who advisedly affirm by writing or printing that the Pretender has any right to the Crown, or that the King and Parliament cannot limit the succession to it (6 Anne, c. 7), or who hold correspondence

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(n) These statutes are repealed by 2 Will. IV. c. 34; and the law on the subject of offences against the currency, which are no longer capital, is consolidated in the statute 24 & 25 Vict. c. 99. The statute strikes at making, buying, selling, possessing, tendering, uttering, importing, and exporting false coin, either British or foreign, knowingly, or with intent to represent it as genuine, or as of more than its true value. The description of the various acts which are held to be criminal, as having some of these objects in view, are extremely minute, and the statute is referred to for them, and for the statutory penalties attached to them, varying from a few months' imprisonment to fourteen years' penal servitude. Some of the periods are varied by 27 & 28 Vict. c. 47.

with the Pretender, or any person employed by him (13 Gul. III. c. 3), are also guilty of treason.(o).

12. The forms of proceeding in the trial of treason, Forms of proceeding in treason. whether against peers or commoners, are set forth in a small treatise, published by order of the House of Lords in 1709, conjoined to a collection of statutes concerning treason.(p) By the conviction upon this trial, the whole estate of the traitor forfeits to the Crown. His blood is also corrupted; so Pains of treason. that on the death of an ancestor he cannot inherit; and the estate which he cannot take falls to the immediate superior as escheat *ob defectum hæredis*, without distinguishing whether the lands hold of the Crown or of a subject (Coke, 1 Inst. vol. i. lib. 1, c. 1, § 4; Hale, Plac. Coron. vol. i. c. 27). By the aforesaid Act, 7 Anne, c. 21, it is provided that no attainder for treason shall, after the Pretender's death, hurt the right of any person other than that of the offender during his natural life; but this provision is by a posterior Act, 17 Geo. II. c. 39, not to take place as long as any of the sons of the

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(o) As to treason, see Hume, i. 512 *et seq.*; Macd., 2nd ed., 220 *et seq.* The latter statutes on the subject are 36 Geo. III. c. 7, and 57 Geo. III. c. 6, practically superseded by 11 Vict. c. 12. The difficulty of dealing with offences bordering on treason and on sedition led to the creation (in 1848, Treason-felony. by the last mentioned Act) of a new statutory offence called treason-felony, under which even offences which might be charged as treason may be tried. This statute renders liable to imprisonment not exceeding two years, or to penal servitude for periods from seven to fourteen years, any one who may compass, imagine, invent, devise, or intend, to depose the Queen, her heirs, or successors from the Crown of the United Kingdom or of any other of her dominions, or levy war against them within the Kingdom; or to compel them to change their measures or counsels, or force or intimidate both or either of the Houses of Parliament; or move or stir any foreigner to invade any of the domains of the Crown, and who shall express or declare such compassings, &c., by publishing any printing or writing, or by open speaking, or by any overt act or deed. By 5 & 6 Vict. c. 51, the using weapons against or near the Sovereign, with intent to injure or alarm, or in breach of the peace, or having them near him with intent to injure or alarm, is constituted an offence punishable by transportation (now penal servitude) for seven years, or imprisonment.

(p) They are also to be found in Lothian's Forms of Process before the Criminal Courts of Scotland.

Acts saving the  
rights of credi-  
tors, &c.,  
repealed.

Pretender shall be alive.(q) It was for some time doubted whether the Act 1690, c. 33, saving the rights of creditors, &c., was repealed by the Act 7 Anne, subjecting traitors tried in Scotland to the pains and forfeitures of the English law; since the excluding of creditors is not properly a penalty on the traitor, and our private rights are by *art. Union*, c. 18, declared unalterable, except for the evident utility of the subject, which article might seem to require an express repeal of so beneficial a statute. (See farther, Report of Commissioners of Inquiry, 1719, pp. 15, 21, 23, &c.) But it now seems to be an agreed point that the rights even of third parties, in the case of forfeiture on treason, must be determined by the law of England.

Misprision of  
treason.

(28)

13. Misprision of treason, from *meprendre*, is the overlooking or concealing of treason. It is inferred by one's bare knowledge of the crime, and not discovering it to a magistrate or other person entitled by his office to take examinations, though he should not in the least degree assent to it. The foreshaid Act, 7 Anne, makes the English law of misprision ours. Its punishment is by the law of England perpetual imprisonment, together with the forfeiture of the offender's moveables, and of the profits of his heritable estate during his life (Hale, Plac. Coron., vol. i. c. 28); that is, in the style of our law, his single and liferent escheat.

Sedition,

(29)

verbal, or  
leasing-  
making;

14. The crime of sedition consists in the raising commotions or disturbances in the state. It is either verbal or real.(r) Verbal sedition, or leasing-making, is inferred from

(q) But see 39 Geo. III. c. 93.

(r) Hume (i. 553) describes sedition as comprehending "all those practices, whether by deed, word, or writing, or of whatsoever kind, which are suited and intended to disturb the tranquillity of the State, for the purpose of producing public trouble or commotion, and moving His Majesty's subjects to the dislike, resistance, or subversion of the established Government and law, or settled frame and order of things;" and points out that Mr. Erskine's account of the crime is somewhat confused and inaccurate. The chief corrections he makes are as follows:—(1.) Leasing-making is the speaking evil of the sovereign personally, and is distinguishable from sedition, inasmuch as it does not necessarily originate in a purpose of unsettling the State, but may proceed from private malice or spleen; (2.) Actual tumult or violence is not required

the uttering of words tending to create discord between the King and his people. It was formerly punished by death and the forfeiture of goods (1424, c. 43; 1540, c. 83); but now, either by imprisonment, fine, or banishment, at the discretion of the judge (1703, c. 4). Real sedition is generally committed by convoking together any considerable number of people, without lawful authority, under the pretence of redressing some public grievance, to the disturbing of the public peace. Those who are convicted of this crime are punished by the confiscation of their goods; and their lives are to be at the King's will (1457, c. 77).<sup>(s)</sup> For preventing rebellious riots and tumults it is enacted (1 Geo. I. st. 2, c. 5), that if any persons, to the number of twelve, shall assemble, and being required by a magistrate or constable to disperse, shall nevertheless continue together for an hour after such command, the persons disobeying shall suffer death and the confiscation of moveables.<sup>(t)</sup>

15. Judges who wilfully, or through corruption, use their authority as a cover to injustice or oppression, are punished with the loss of honour, fame, and dignity (1540, c. 104).<sup>(30)</sup> Under this head may be classed theftbote (from *bote*, compensation), which is the taking a consideration in money or goods from a thief to exempt him from punishment or connive at his escape from justice. A sheriff or other judge guilty of this crime forfeits his life and goods (1436, c. 137).

Corruption in judges.

(30)

Theftbote.

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to support an indictment for sedition, it being enough if the conduct of the accused be calculated to produce a state of things which may naturally issue in public trouble and commotion (see also *John Grant & Others*, Nov. 7, 1848, Shaw's Rep. 17; Macdonald's Crim. Law, 2nd ed., 229).

(s) Leasing-making and sedition are now punished by imprisonment or fine, or both, at the discretion of the Court (6 Geo. IV. c. 47, as amended by 7 Will. IV. & 1 Vict. c. 5).

(t) Now penal servitude or imprisonment (7 Will. IV. & 1 Vict. c. 91, as amended by the Penal Servitude Acts, 20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47). It is not necessary to guilt of the crime of mobbing or rioting that the Act shall have been read. All are guilty who take part in any concourse of people combining and acting for an illegal purpose (whether premeditated or taken up at the moment) so as to alarm the lieges or disturb the public peace (see also Macdonald, 2nd ed., 180).

Mobbing and rioting.

Buying of  
claims.

And by a posterior statute (1515, c. 2), even a private person who takes theftbote suffers as the principal thief. The buying of disputed claims, concerning which there is a pending process, by any judge or member either of the Session or of an inferior court, is punished by the loss of the delinquent's office, and all the privileges thereto belonging (1594, c. 216).

Deforcement.

(32, 33)

Session compe-  
tent to it.

(34)

16. Deforcement is the opposition given or resistance made to messengers or other officers, while they are employed in executing the law.(u) The Court of Session is competent to this crime (1581, c. 118); and by the last statute relating to it (1592, c. 150), it is made punishable with the confiscation of moveables, the one half to the King and the other to the creditor at whose suit the diligence was used.(v) Where the deforcement is brought only *ad civilem effectum*, for recovering the debt and damages, the statute is amply interpreted; and consequently process will be sustained if the messenger should be any how hindered in the execution of the diligence, though without the effusion of blood; but in a criminal trial, where the conclusion is penal, effusion of blood must be libelled, in terms of the Act 1592.(x) Thus also, although the words of the Act are levelled only against the debtor, or person commanded by him, practice has extended it, in a *civil* action, against those who interpose to save their friend from diligence without being desired by the debtor.

Deforcement  
of officers of  
the revenue.

(35)

17. Deforcement of the officers of the customs, by persons to the number of eight or upwards, was punished by transportation to America for a term of years not exceeding seven; 6 Geo. I. c. 21, § 34. But now, by 19 Geo. II. c. 34, armed persons, to the number of three or more, assisting in the illegal running, landing, and exporting, of prohibited or uncustomed goods, or any who shall resist, wound, or maim, any officer of

(u) To constitute this crime the resistance must have been successful.

(v) In modern times the punishment is usually limited to imprisonment.

(x) Hume (i. 394). "No such narrow, and indeed pernicious, construction of the law has ever been received into practice" (See also Macd., 2nd ed., 215, 216).

the revenue in the execution of his office, shall suffer death and the confiscation of moveables.(y)

18. Breach of arrestment (iii. 6, 6) is a crime of the same nature with deforcement, as it imports a contempt of the law and of our judges ; and it is subjected to the pains inflicted on deforcement by 1581, c. 118—viz., an arbitrary corporal punishment and the escheat of moveables ; with a preference to the creditor for his debt, and for such further sum as shall be modified to him by the judge. Under this head of crimes against good government and police may be reckoned the forestalling of markets—that is, the buying of goods intended for a public market before they are carried there—which for the third criminal act infers the escheat of moveables (1592, c. 148) ;(z) slaying salmon in forbidden time (1503, c. 72) ;(a) offences against the acts for preserving the game (ii. 1, § 6) ; destroying plough-graith in time of tillage, and slaying or houghing horses or cows in time of harvest (1587, c. 82), and destroying or spoiling growing timber (1698, c. 16 ; 1 Geo. I. st. 2, c. 48).

Breach of  
arrestment.  
(36)

Forestalling of  
markets.  
(38, 39)

Offences  
against the  
game, plant-  
ing, &c.

19. Crimes against particular persons may be directed either against life, limb, liberty, chastity, goods or reputation. Murder is the wilful taking away of a person's life without a necessary cause. The distinction which obtained in our ancient law between slaughter premeditated, or upon *forethought felony*, and that which was committed on a suddeny or *chaud mella*, indulging to the last the privilege of girth and sanctuary (St. Rob. II. c. 9 ; 1555, c. 31), was taken off by 1661, c. 22 (copied after 1649, c. 19), which supposes homicide to be a capital crime, without any such distinction.

Murder.  
(40-45)

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(y) The laws as to smuggling are now consolidated by 39 & 40 Vict. c. 36, and the punishment of death is abolished. By §§ 187, 188 a fine is imposed on persons assaulting or obstructing a revenue officer in discharge of his duty. By § 189, smugglers when armed or disguised are liable to three years' imprisonment ; and by § 193, persons shooting at or wounding revenue officers, may be sentenced to five years' penal servitude.

(z) The statutes against forestallers are in desuetude.

(a) The penalties for taking salmon in close time are now provided for by 31 & 32 Vict. c. 123, § 19-24.

Casual  
homicide.

Casual homicide, where the actor is in some degree blameable, and homicide in self-defence, where the just bounds of defence have been exceeded, are punished arbitrarily by this Act; but the slaughter of night-thieves, house-breakers, assistants in masterful depredations, or rebels denounced for capital crimes, may be committed with impunity. (b) The

Demembra-  
tion.

(50)

crime of demembration, or the cutting off of a member, is joined with that of murder in 1491, c. 28; but in practice its punishment has been restricted to the escheat of moveables, and an assythment or indemnification to the party. Mutilation, or the disabling of a member, is punished at the discretion of the judge; see Pitmedden on Demembration, p. 65. (c)

Mutilation.

Self-murder.

(46)

20. Self-murder is as highly criminal as the killing our neighbour; and for this reason our law has, contrary to the rule *crimina morte extinguuntur*, allowed a proof of the

(b) "Homicide, the taking away of the life of a human being, when it amounts to a crime, is of two kinds: *Culpable homicide* and *murder*. Opposed to these are *casual* and *justifiable homicide*, which, as innocent acts, do not infer punishment. In *casual homicide* the death has been the result of pure misadventure or accident; and in *justifiable homicide* it has been an intentional but legitimate act. In *culpable homicide*, on the other hand, it has been caused by blameable conduct, under circumstances falling short of the guilt of *murder*, to which malice aforethought, or such extreme recklessness as the law holds to imply such malice, is essential."—MOIR. Culpable homicide may be either voluntary or involuntary. It is voluntary when the killing is intentional though the circumstances are such as to imply neither murder on the one hand nor justifiable homicide on the other; it is involuntary when death results either from the performance of an unlawful act or from want of due caution and circumspection in the performance of a lawful act. Every charge of murder is held to include a charge of culpable homicide, and the jury may, if they please, find the panel guilty of the lesser crime only. The punishment of culpable homicide ranges from a merely nominal penalty to penal servitude for life, according to the circumstances of the case.

(c) Demembration and mutilation are now usually prosecuted as aggravated assaults.

Attempts to  
murder, dis-  
figure, &c.

A variety of attempts—to shoot, poison, drown, stab, cut, to disfigure or do grievous bodily harm by throwing acids, &c.—are dealt with by 10 Geo. IV. c. 38, and made capital, but sentence of death can only be pronounced where, if death had followed the acts done, they would have amounted to murder.

crime after the offender's death, that his single escheat might fall to the King or his donatary. To this end an action must be brought, not before the justiciary, but the session, because it is only intended *ad civilem effectum*, for proving and declaring the self-murder; and the next-of-kin to the deceased must be made a party to it.(d)

21. The punishment of parricide, or of the murder of a **Parricide.** parent, is not confined by our law to the criminal himself. (47) All his posterity in the right line are declared incapable of inheriting; and the succession devolves on the next collateral heir (1594, c. 220). Even the cursing or beating of a parent infers death, if the person guilty be above sixteen years, and an arbitrary punishment if he be under it (1661, c. 20).(e) A presumptive or statutory murder is constituted **Murder of** by 1690, c. 21, by which any woman who shall conceal her **infants.** pregnancy during its whole course, and shall not call for or (48) make use of help in the birth, is to be reputed the murderer, if the child be dead or amissing. This Act was intended to discourage the unnatural practice, which yet continues too frequent, of women making away with their children begotten in fornication, to avoid church censures.(f)

22. Duelling, *bellum inter duos*, is the crime of fighting **Duelling.** in single combat, on previous challenges given and received. (49) The single combat was authorised by the Gothic polity, as a method of determining both civil and criminal questions; but fighting in a duel without license from the King is by 1600, c. 12, made punishable by death. This Act is ratified by 1696, c. 35, which also enacts that whatever person, principal or second, shall give a challenge to fight a duel, or shall accept a challenge, or otherwise engage therein, shall be

(d) Such actions are now unknown. An attempt to commit suicide is now usually dealt with as a police offence.

(e) The pains of law are always restricted to an arbitrary punishment.

(f) The Act 1690, c. 21, is repealed by 49 Geo. III. c. 14, which enacts, that "if any woman shall conceal her being with child during the whole period of her pregnancy, and shall not call for and make use of help or assistance in the birth, and if the child be found dead or be amissing," she shall be imprisoned for a period not exceeding two years.

punished by banishment and escheat of moveables, though no actual fighting should ensue.(g)

Haimsucken.

23. Haimsucken (from *haim*, home, and *socken*, to seek or pursue), is the assaulting or beating of a person in his own house. The punishment of this crime is nowhere defined, except in the Books of the Majesty, which make it the same as that of a rape (l. 4, c. 9, 10); and it is, like rape, capital by our practice (Mack. Cr. Tr. tit. Haimsucken). The assault must be made in the proper house of the person assaulted, where he lies and rises daily and nightly (*ibid.* l. 1, c. 9, § 1); so that neither a public house, nor a private where one is only transiently, fall within the law.(h)

Battery pendente lite.

(37)

24. Any party to a law-suit who shall slay, wound, or otherwise invade his adversary at any period of time between executing the summons and the complete execution of the decree, or shall be accessory to such invasion, shall lose his cause (1584, c. 138; 1594, c. 219). As these Acts direct that proof shall be previously taken of the invasion by the justice or other competent judge, the Court of Session sustain themselves judges, because they are truly competent to all causes where the conclusion is merely civil. The sentence pronounced on this trial against him who has committed the battery is by the Act declared not subject to reduction, either on the head of minority or any other ground whatever. And if the person prosecuted for this crime shall be denounced for not appearing, his liferent, as well as single escheat, falls upon the denunciation.(i)

(g) The statutes 1600, c. 12, and 1696, c. 35, are repealed by 59 Geo. III. c. 70. In strict law, killing in a duel is murder to all the parties concerned, although the person killed was the challenger; but in modern practice, juries have declined to convict where no unfair advantage has been taken (Hume, i. 232, note 2). Challenging a person to fight a duel, and duelling itself, where death does not ensue, are punishable as breaches of the peace (*James B. Burns and Others*, H.C. Jan. 6, 1842, 1 Broun 1).

(h) As to Haimsucken, see Hume, i. 312 *et seq.*; Macd., 2nd ed., 164 *et seq.* The essence of the crime consists in entering the house for the purpose and with the design of committing the assault. In modern practice the pains of law are always restricted.

(i) The statutes referred to having been repealed by 7 Geo. IV. c. 19, the crime of battery *pendente lite* is no longer known to the law.

25. The crime of wrongous imprisonment is described (1701, c. 6). It is inferred by granting warrants of commitment in order to trial, proceeding on informations not subscribed, or without expressing the cause of commitment; by receiving or detaining prisoners on such warrants; by refusing to a prisoner a copy of the warrant of commitment; by detaining him in close confinement above eight days after his commitment; by not releasing him on bail, where the crime is bailable; and by transporting persons out of the kingdom without either their own consent or a lawful sentence (see below, § 48). The persons guilty of wrongous imprisonment are punished by a pecuniary mulct, from £6000 down to £400 Scots, according to the rank of the person detained; and the judge or other person acting contrary to the directions of the Act is, over and above, subjected to pay to the person detained a certain sum *per diem* proportioned to his rank, and is declared incapable of public trust. All these penalties may be insisted for by a summary action before the Session, and are subject to no modification. Private persons may be guilty of this crime (*Paterson v. Anderson*, Dec. 14, 1736, M. 17,069). (j) Wrongous imprisonment. (31)

26. Adultery is the crime by which the marriage-bed is polluted. This crime could, neither by the Roman law (l. 6, § 1, *ad leg., Jul. de adult.*, 48, 5) nor the Jewish (Lev. xx. 10; Deut. xxii. 22) be committed but where the guilty woman was the wife of another. By ours it is adultery if either the man or woman be married. We distinguish between simple adultery and that which is notorious or manifest. Open and manifest adulterers, who continue incorrigible, notwithstanding the censure of the Church, were punished (1551, c. 20) by the escheat of moveables; but soon thereafter (by 1563, c. 74) the punishment of notorious and manifest adultery was made capital. This crime is distinguished by one or other of the following characters: where there is issue procreated between the two adulterers; or where they keep bed and company together notoriously; or where they give Adultery, what. (52)  
Notour adultery. (53)

(j) Wrongous imprisonment gives rise to an action of damages in the Civil Court, directed, according to circumstances, against officers of the law or private parties.

Simple  
adultery.

scandal to the Church, and are, upon their obstinate refusing to listen to their admonitions, excommunicated (1581, c. 105). The punishment of simple adultery, not being defined by statute, is left to the discretion of the judge; but custom has made the falling of the single escheat one of its penalties (*Baird v. Baird*, Jan. 9, 1662, M. 12,630).<sup>(k)</sup>

Bigamy.

(54)

27. Bigamy is a person's entering into the engagements of a second marriage in violation of a former marriage vow still subsisting.<sup>(l)</sup> Bigamy on the part of the man has been tolerated in many states before the establishment of Christianity, even by the Jews themselves; but it is prohibited by the precepts of the Gospel, and it is punished by our law, whether on the part of the man or of the woman, or both, with the pains of perjury (1551, c. 19).<sup>(m)</sup>

Incest.

(56)

28. Incest is committed by persons who stand within the degrees of kindred forbidden in Lev. xviii., and it is punished capitally by 1567, c. 14. The same degrees are prohibited in affinity as in consanguinity (Lev. xviii. 14 *et seq.*). As this crime is repugnant to nature itself, it is an ill-founded opinion that incest cannot be committed but between persons born in lawful marriage, for in questions of the law of nature all children, whether lawful or natural, stand on an equal footing (*Civilis ratio civilia jura corrumpere potest, non vero naturalia*).<sup>(n)</sup> It is difficult indeed to bring a legal proof of a relation merely natural on the side of the father; but the mother may be certainly known without marriage.

Rape.

(55)

29. There is no explicit statute making rape, or the ravishing of a woman, capital; but it is plainly supposed in Act 1612, c. 4, by which the ravisher is exempted from the pains of death only in the case of the woman's subsequent consent, or her declaration that she went off with him of her

<sup>(k)</sup> Criminal prosecution of adultery has been long unknown.

<sup>(l)</sup> Neither the first marriage nor the second pretended marriage need be regular. Proof by the accused of reasonable grounds for believing that his or her spouse was dead is a good defence.

<sup>(m)</sup> The punishment of bigamy is now usually imprisonment, but penal servitude may be inflicted in aggravated cases.

<sup>(n)</sup> But see Hume, i. 452; Alison, i. 565; Macd., 2nd ed., 199.

own free will; and even then he is to suffer an arbitrary punishment, either by imprisonment, confiscation of goods, or a pecuniary fine.(o)

30. Theft is defined a fraudulent intermeddling with the Theft. property of another with a view of making gain.(p) Neither (58) the law of Moses nor of Rome punished theft capitally. By the first, the thief was bound to restore in some cases five times the value, in others less (*Exod. xxii. 1 et seq.*); and by the Roman, either the double or quadruple, according to the circumstances attending the crime. Our ancient law (59) proportioned the punishment of the theft to the value of the goods stolen; heightening it gradually from a slight corporal punishment to a capital, if the value amounted to thirty-two pennies Scots, which in the reign of David I. was the price of two sheep (*Reg. Maj. l. 4, c. 16, § 3; Leg Burg. c. 121, § 6*). In several latter Acts it is taken for granted that this crime is capital (1587, c. 82; 1606, c. 5, &c.). But where the thing stolen is of small value, we consider it not as theft, but as pickery, which is punished either corporally or by banishment. The breaking of orchards and the stealing

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(o) Rape is the carnal knowledge of a woman's person forcibly and against her will. It is completed by penetration. In the case of females below twelve years of age no proof of force is required, as they are incapable of giving consent. Rape may be committed even on a common prostitute. The punishment is now usually penal servitude for life, or for a long period.

(p) Hume's definition is, "the felonious taking and carrying away of the property of another for lucre." The crime is not completed unless the article be removed from where it was. By "lucre" is not to be understood only pecuniary gain, for it is equally theft if the article be taken for the purpose of gratifying a feeling of spite against the owner, or if the taker get the kind of use he desired when he took, as in *plagium Plagium*.—theft of a human being under puberty,—as where a child was stolen, though only with the object of using its service for a short time (see *Wade, 1844, 2 Broun 288*).

It must be borne in mind that there may be theft of goods in the Breach of trust. custody of the thief—if that custody was given by the owner for a limited purpose,—as a watch to clean. If by the nature of the custody the thief had even a limited ownership—was not an assistant but an agent liable to account—the case would be one of breach of trust.

of green wood is punished by a fine, which rises as the crime is repeated (1579, c. 84).

Aggravated  
theft.

(61)

Reset of theft.

(63)

31. Theft may be aggravated into a capital crime though the value of the thing stolen be trifling; as theft twice repeated (*Leg. Burg.* c. 121, § 5); or committed in the night (*arg.* 1661, c. 22); or by landed men; or of things set apart for sacred uses.(q) The receivers and concealers of stolen goods, knowing them to be such, suffer as thieves (*St. Alex.* II. c. 21). Those who barely harbour the person of the criminal (*receptatores*) within forty-eight hours either before or after committing the crime, are punished as partakers of the theft (1567, c. 21). Such as sell goods belonging to thieves or lawless persons, who dare not themselves come to market, are punished with banishment and the escheat of moveables (1587, c. 109).(r)

Robbery, rief,  
stouthrief,  
sorning.

(64)

32. Theft, attended with violence, is called robbery; and in our old statutes rief (1477, c. 78) or stouthrief (1515, c. 2), under which class may be included sorning, or the taking of meat and drink by force without paying for it. Stouthrief came at last to be committed so audaciously, by bands of men associated together, that it was thought necessary to vest all our freeholders with a power of holding courts upon sorners and rievors, and condemning them to death (1594, c. 227). Nay, all were capitally punished who, to secure their lands from depredation, paid to the rievors a yearly contribution, which got the name of *Black-mail* (1567, c. 21; 1587, c. 102). An Act passed (1609, c. 13) commanding to ban-

Black-mail.

Egyptians.

(q) Theft is not now punished with death, however aggravated it be. The principal aggravations in modern practice are housebreaking, opening lockfast places, previous conviction of theft or robbery, or being habit and repute a thief. The distinction between a slight theft and a *furtum grave* is now of little moment except in questions of bail. See *H. M. Adv. v. City of Glasgow Bank Directors*, Nov. 14, 1878, 6 R., Just. Cases, 4.

Post-office  
offences.

(r) The greater number of post-office offences fall under the head of theft, reset, or breach of trust, and may be charged as such, but they have also been made the subject of special statutes (7 Will. IV.; 1 Vict. c. 36; 3 & 4 Vict. c. 96).

Theft of oysters  
and mussels.

Taking oysters or mussels from beds known to belong or marked out as the property of others, are statutory offences under 3 & 4 Vict. c. 74. and 10 & 11 Vict. c. 92. There are many other examples of special offences of this class being dealt with by statute.

ishment a band of sorners who were originally from Egypt, called Gypsies, and adjudging to death all that should be reputed Egyptians if found thereafter within the kingdom. Robbery committed on the seas is called Piracy, and is punished capitally by the High Admiral.<sup>(s)</sup> Several of the facts which constitute this crime are set forth in a British statute (8 Geo. I. c. 24).<sup>(t)</sup>

33. Falsehood, in a large sense, is the fraudulent imitation or suppression of truth, to the damage of another. The lives and goods of persons convicted of using false weights or measures were by our old law in the King's mercy; and their heirs could not inherit but upon a remission (*Leg. Burg.*, c. 132). The latest statute against this crime (1607, c. 2) punishes it by confiscation of moveables.<sup>(u)</sup>

34. That particular species of falsehood which consists in the falsifying of writings passes by the name of forgery, and was by the Roman law punished capitally, where the atrocity of the fact required it (l. 22, *C. ad leg. Corn. de fals.*, 48, 10). By our statute law the punishment of this crime was at first the amputation of the hand (*St. Alex. II.*, c. 19), afterwards proscription, banishment, and dismembering of the hand and tongue, joined with the other pains inflicted by the common law (1551, c. 22); and at last it is declared in general terms to be the pains due to the committers of falsehood (1621, c. 22). Our practice has now of a long time, agreeable to the Roman law, made the crime capital, unless the forgery be of executions, or other writings of smaller moment, in which case it is punished arbitrarily (*Macvicar*, Feb, 1739, n.r.)<sup>(v)</sup>

(s) Now the High Court of Justiciary.

(t) Illegal pursuit of game so often leads to acts of violence that it has been the subject of statutory enactment. The Day and Night Poaching Acts, 9 Geo. IV. c. 69, and 7 & 8 Vict. c. 29. The illegal pursuit is itself an offence: much more when the poacher is armed, or there is a gang, all or any of whom are armed, and they assault persons authorised to arrest.

The law of Master and Servant, and Combinations of either class, has been referred to above, B. iii. t. iii. Note B. See also 38 & 39 Vict. c. 86.

(u) See 41 & 42 Vict. c. 49, §§ 25-27, 32, 56-60.

(v) By 7 Will. IV. & 1 Vict. c. 84, the punishment of death was abolished in cases of forgery.

The false writing must be used.

(69)

What if the user abide by it.

The Court competent to forgery.

(68)

Consignation in improbations.

Proof in improbation.

(70)

Direct

35. The writing must not only be fabricated, but put to use, or founded on, in order to infer this crime. Any person who founds on a writing alleged to be false may be put to declare judicially whether he is willing to abide by it as a true deed. If he declines to abide by it, the deed is pronounced false; but he is not absolved on his passing from it, if evidence be brought that he was accessory to the forgery (1621, c. 22). Frequently the user of the deed offers to abide by it *qualificate*, or under protestation that it came fairly into his hands, and that he had no accession to the crime. The immediate receiver of a writing must in all cases abide by it simply; but heirs and singular successors are, in certain favourable cases, allowed to do it under a quality, the import of which is to be afterwards considered by the judge.

36. The trial of forgery, though it be strictly criminal, is proper to the Court of Session (i. 3, § 11); but where improbation is moved against a deed by way of exception, the inferior judge before whom the action lies is competent to it *ad civilem effectum* (arg. 1557, c. 62). He who pleads improbation, either by way of action or exception, was by said Act 1557 obliged to give security to pay a certain sum, at the discretion of the judge, if he should succumb in his allegation. Afterwards, by an Act of Sederunt (mentioned in Books S., Jan. 8, 1583-4), in place of security for the sum modified, it was to be consigned; but these Acts are now quite in disuse where the improbation is undertaken by way of action. When it is pleaded as an exception, our practice, to discourage affected delays, obliges the defender who moves it to consign £40 Scots; which he forfeits if his plea shall appear calumnious.

37. The proof in improbation is either direct or indirect. The first is by the testimony of the writer of the deed, and of the witnesses who attest it, called the instrumentary witnesses. A proof by the indirect manner is gathered from circumstances and extrinsic arguments. If one of the two instrumentary witnesses should depose that the writing is true, and the other that he did not attest it, the writing will be annulled, being supported by the testimony of one witness

only; but the user will not be subjected to the pains of falsehood, because he is justified by the oath of that witness. Where witnesses attest a deed without knowing the granter, and seeing him subscribe, or hearing him own his subscription, the deed is not only improbable, but such witnesses are declared accessory to forgery (1681, c. 5). Yet, as this sort of accession is merely statutory, the punishment ought to be restricted at the discretion of the judge. The circumstances by which forgeries are most frequently discovered in the indirect way are, *comparatione literarum*, by comparing the handwriting of the writer, or the subscription of the granter, as it stands in other genuine writings, with that which appears in the deed in question; by the manner of spelling; by the agreement or disagreement of the style of the deed with that of the age in which it is said to have been executed; by the stamp of the paper; by a false date, or by a proof that the alleged granter was not at that date in the place where the deed bears to have been signed; which last is called *alibi*. (73) and indirect. (71)

38. Where a person found guilty of forgery by the Court of Session is by them remitted to the Justiciary (i. 3, § 11), an indictment is there exhibited against him, and a jury sworn, before whom the decree of Session is produced, in place of all other evidence of the crime, in respect of which the jury find the panel guilty; so that that decree being pronounced by a competent court is held as full proof, or, in the style of the bar, as *probatio probata*.(x) Forgery, when capital, is remitted to the Justiciary. (72)

39. Perjury, which is the judicial affirmation of a falsehood on oath, really constitutes the *crimen falsi*; for he who is guilty of it does in the most solemn manner substitute falsehood in the place of truth. To constitute this crime, the violation of truth must be deliberately intended by the swearer; and, therefore, reasonable allowances ought to be given to forgetfulness or misapprehension, according to his age, health, and other circumstances. The breach of a promissory oath does not infer this crime; for he who promises Perjury; (74)

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(x) Hume (i. 166-7) indicates a contrary opinion; but the point is of no practical interest, as forgery is now invariably prosecuted before the Court of Justiciary.

on oath may sincerely intend performance when he swears, and so cannot be said to call on God to attest a falsehood. Though an oath, however false, if made upon reference in a civil question, concludes the cause, the person perjured is liable to a criminal trial; for the effect of the reference can go no further than the private right of the parties.

its punish-  
ment;

(75)

before whom  
competent.

Subornation  
of perjury.

Stellionate.

(79)

Granting of  
double rights.

Fraudulent  
Bankruptcy.

40. Notwithstanding the mischievous consequences of perjury to society, it is not punished capitally either by the Roman law (l. 13, C. *de test.*, 4, 20) or by ours. The special punishment of swearing falsely on an assize was confiscation of moveables, imprisonment for a year, and infamy (*Reg. Maj.* l. 1, c. 14); which punishment came in the course of time to be transferred to perjury in general, with a small variation (1555, c. 47).<sup>(y)</sup> The Court of Session is competent to perjury *incidenter*, when, in any examination upon oath, taken in a cause depending before them, a person appears to have sworn falsely; but in the common case that trial is proper to the justiciary. Subornation of perjury consists in tampering with persons who are to swear in judgment, by directing them how they are to depose, and it is punished with the pains of perjury (said 1555, c. 47).<sup>(z)</sup>

41. The crime of stellionate, from *stellio* (Plin. Hist. Nat. l. 30, c. 10), includes every fraud which is not distinguished by a special name; but is chiefly applied to conveyances of the same numerical right granted by the proprietor to different disponees (l. 3, § 1, *Stellion.*, 47, 20; 1592, c. 142). The punishment of stellionate must necessarily be arbitrary, to adapt it to the various natures and different aggravations of the fraudulent acts (l. 3, § 2, *Stellion.*, 47, 20). The persons guilty of that kind of it which consists in granting double conveyances are by our law declared infamous, and their lives and goods at the King's mercy (1540, c. 105). The cognisance of fraudulent bankruptcy is appropriated to the Court of Session, who may inflict any punishment on the offender

<sup>(y)</sup> See case of *Rob. Maxwell*, H.C., Jan. 31, 1865, 5 Irv. 65, and 37 Sc. Jur. 211.

<sup>(z)</sup> Even the attempt to suborn is punishable (1 Hume, 381-2).

that appears proportioned to his guilt, death excepted (1696, c. 5).<sup>(a)</sup>

42. The crime of usury,<sup>(b)</sup> before the Reformation, consisted in the taking of any interest for the use of money; and now in taking a higher rate of interest than is authorised by law. It is divided into *usura manifesta*, or direct; and *velata*, or covered. One may be guilty of the first kind either where he covenants with the debtor for more than the lawful interest on the loan of money, or where one receives the interest of a sum before it is due, since thereby he takes a consideration for the use of money before the debtor has really got the use of it (1621, c. 28). Where a debt is clogged with an uncertain condition, by which the creditor runs the hazard of losing his sum, he may covenant for an higher interest than the legal without the crime of usury; for there the interest is not given merely in consideration of the use of the money, but of the danger undertaken by the creditor. Hence, one who lends money upon bottomry, the repayment of which depends upon the safe return of the ship on which the money is lent, may lawfully take a rate of interest proportioned to his risk.

Usury;  
(76)

Undertaking a  
risk excludes  
usury.

Bonds of  
bottomry.

43. Covered usury is that which is committed under the mask, not of a loan, but of some other contract—*e.g.*, a sale, or an improper wadset. Thus, a back-tack which is given by a wadsetter to the reverser for payment of a tack-duty exceeding the legal interest of the sum lent, is accounted a loan though covered under the contracts of wadset and location, and consequently infers usury. And, in general, all obligations entered into with an intention of getting more than the legal interest for the use of money, however they

Indirect usury,  
(77)

by our old  
law;

(a) A doubt as to the competency of the Court of Justiciary to try this offence was removed by 7 & 8 Geo. IV. c. 20. Various frauds connected with bankruptcy have been dealt with by the Court as crimes,—secrection of property, and fraudulently taking out sequestration, and trying to escape from the country. Questions of this description have been recently discussed in *Snedon*, 10th April, 1874, 2 Coup. 532, and *Clendinning*, 2 Dec., 1875, 3 Coup. 171. Some offences of this class are statutory (19 & 20 Vict. c. 79, § 8; 43 & 44 Vict. c. 34, §§ 13-16).

(b) By 17 & 18 Vict. c. 90, the whole laws against usury are repealed.

by a British  
Act.

may be disguised, are declared usurious by 1597, c. 247. As a farther guard against this crime, taking of more than the legal interest for the forbearance of payment of money, merchandise, or other commodities, by way of loan, exchange, or other contrivance whatever; or the taking a bribe for the loan of money, or for delaying its payment when lent, is declared usury (12 Anne, st. 2, c. 16).

Usury, how  
punished ;

(78)

44. The punishment of usury was by said Act 1597 declared to be the escheat of moveables, annulling the usurious contract, and a forfeiture of the principal sum lent, with the lawful interest due upon it, to the King or his donatary, with the burden of restoring to the private party, in case he should concur in the prosecution, the unlawful profits given by him to the creditor. But by the aforesaid Act of Q. Anne the usurious obligation is not only declared void, but the creditor, if he has received any unlawful profits, forfeits the treble value of the sums or goods lent. Usury, when it is to be pursued criminally, must be tried by the Justiciary; but where the libel concludes only for the voiding of the debt or restitution, the Session is the proper court.

before whom  
competent.

Injury ;

(80)

verbal,

45. Injury, in its proper acceptation, is the reproaching or affronting our neighbour. Injuries are either verbal or real. A verbal injury, when directed against a private person, consists in the uttering contumelious words, which tend to expose our neighbour's character by making him little or ridiculous. Where these offensive words are uttered in the heat of a dispute, and spoken to the person's face, the law does not presume any malicious intention in the utterer, whose resentment generally subsides with his passion; and yet, even in that case, the truth of the injurious words seldom absolves entirely from punishment. It does not seem that the twitting one with natural defects, without any sarcastical reflections, though it be inhumane, falls under that description, as these imply no real reproach in the just opinion of mankind. Where the injurious expressions have a tendency to blacken one's moral character, or fix some particular guilt upon him, and are deliberately repeated in different companies, or handed about in whispers to confidants, it then grows up to the crime of slander,

agreeably to the distinction of the Roman law (l. 15, § 12, *de injur.*, 47, 10). And where a person's moral character is thus attacked, the *animus injuriandi* is commonly inferred from the injurious words themselves, unless special circumstances be offered to take off the presumption—*ex gr.*, that the words were uttered in judgment, in one's own defence, or by way of information to a magistrate, and had some foundation in fact. The cognisance of slander was, and perhaps is to this day, proper to the commissaries, who, as the *judices Christianitatis*, were the only judges of scandal; but for some time past bare verbal injuries, or hasty words uttered intemperately *in rixâ*, have been tried by other criminal judges, and even by the Session (*Auchinleck v. Gordon*, 1755, M. 7348). It is punished either by a fine, proportioned to the condition of the persons injuring and injured and the circumstances of time and place (l. 7, § 8, *de injur.*, 47, 10); or, if the injury import scandal, by publicly acknowledging the offence; and frequently the two are conjoined. The calling one a *bankrupt* is not, in strict speech, a verbal injury, as it does not affect the person's moral character; yet, as it may hurt his credit in the way of business, it founds him in an action of damages, which must be brought before the judge-ordinary. (c) A real injury is inflicted by any fact by which a person's honour or dignity is affected; as striking one with a cane, or even aiming a blow without striking; spitting in one's face; (d) assuming a coat of arms, or any other mark of distinction proper to another, &c. The composing and publishing defamatory libels may be reckoned of this kind. Real injuries are tried by the judge-ordinary, and punished either by fine or imprisonment, according to the demerit of the offenders.

46. After having shortly explained the several crimes punishable by our law, this treatise may be concluded with a few observations on criminal jurisdiction; the forms of trial; and the methods by which crimes may be extinguished. Criminal jurisdiction is founded—(1.) *Ratione domicilii*, if the defender dwells within the territory of the judge; for

before whom  
competent,  
(l. 5, 30)

its punish-  
ment.  
(81)

Real injury.

Criminal  
jurisdiction,  
*ratione domicilii*;

(c) Slander is now invariably tried in the civil court and by jury; see above, b. iii. t. iii. Note F, p. 401. (82, 83)

(d) These may be libelled in the criminal court as assault.

every criminal judge must have a power inherent in him of punishing all offenders subject to his jurisdiction. Vagabonds, who have no certain domicile, may be tried wherever *ratione delicti*. they are apprehended. (2.) *Ratione delicti*, if the crime was committed within the territory; because, in this way those under whose eye the fact was perpetrated will, by seeing it also punished, be most effectually deterred from copying after such examples (St. Gul., c. 18); and the just resentment of the person injured, or his friends, will be most amply satisfied (l. 28, § 15, *de pæn.*, 48, 19). And indeed, by several old temporary Acts (1436, c. 148; 1491, c. 28), criminals were to be tried by that judge alone within whose territory the crime was committed. (e) Treason is triable by the English law in that county alone where it is committed. But by 19 Geo. II. c. 9, it was made lawful to try treasons committed *anno* 1745, in any county that the King should appoint: and by a temporary Act, now expired (21 Geo. II. c. 19), treason committed in certain Scots counties was made triable by the Court of Justiciary, wherever it should sit.

Treason, where triable.

What persons cannot be tried criminally.

(83)

47. No criminal trial can proceed unless the person accused is capable of making his defence. Absents, therefore, cannot be tried; nor fatuous nor furious persons, *durante furore*, even for crimes committed while they were in their senses. For a like reason, minors who had no curators could not, by the Roman law, be tried criminally (l. 4, *C. de auct. præst.*, 5, 59), lest they should, from the heat of youth, either speak out or conceal that which, if it had not been spoken or concealed, might have profited them. This privilege was still further stretched by *Reg. Maj.*, l. 3, c. 32, § 15, which exempted all minors from such prosecutions; but our present practice considers every person who is capable of dolo to be also sufficiently qualified for making his defence in a criminal trial.

(e) The only proper *forum* in matters criminal is the *forum delicti*. In cases of *crimen continuum*, there may be more than one count having jurisdiction. As to offences committed on board British ships on the high seas or in foreign ports, or in foreign ships within the territorial waters of Her Majesty's dominions, see 18 & 19 Vict. c. 91, § 21, and 41 & 42 Vict. c. 73.

48. No person can be imprisoned in order to trial for any crime without a warrant in writing expressing the cause, and proceeding upon a subscribed information (1701, c. 6), unless in the case of indignities done to judges, riots, and the other offences specially mentioned in the statute. Every prisoner committed in order to trial, if the crime of which he is accused be not capital,<sup>(g)</sup> is entitled to be released upon bail, the extent of which is to be modified by the judge, not exceeding 6000 merks Scots for a nobleman, 3000 for a landed gentleman, 1000 for any other gentleman or burgess, and 300 for any inferior person (*ibid.*); which sums, to which the bail to be taken is limited, are doubled by 11 Geo. I. c. 26, § 11.<sup>(h)</sup> That persons who, either from the nature of the crime with which they are charged, or from their low circumstances cannot procure bail, may not lie for ever in prison untried, it is made lawful by the said Act 1701 to every such prisoner to apply to the criminal judge that his trial may be brought on. The judge must within twenty-four hours after such application issue letters directed to messengers, for intimating to the prosecutor to fix a diet for the prisoner's trial within sixty days after the intimation, under the pain of wrongous imprisonment. And if the prosecutor does not insist within that time, or if the trial is not finished in forty days more,<sup>(i)</sup> when carried on before the Justiciary, or in thirty when before any other judge, the

Commitment  
of criminals.

(85)

Bail taken in  
crimes not  
capital.

A criminal  
may insist for  
his trial.

(g) For list of offences not bailable without the consent of the Lord Advocate, see circular issued by Crown Office in 1854, and printed in Macd., 2nd ed., 266, note 2. To these must be added treason-felony (11 Vict. c. 12, § 9). The High Court of Justiciary have jurisdiction in all cases, even though capital, to allow bail, and to fix the amount. In the case of the directors of the City of Glasgow Bank (Nov. 14, 1878, 6 R., Just. Cases, 4), *furtum grave* was held to be still one of those "capital" offences which are not bailable without the Lord Advocate's consent.

(h) By 39 Geo. III. c. 49, the maximum amount of bail was further extended to £1200 sterling for a nobleman, £600 for a landed gentleman, £300 for any other gentleman, burgess, or householder, and £60 for any inferior person. In cases of sedition, the amount may be extended by any Judge of the Court of Justiciary.

(i) The forty days are to be counted from the last of the sixty (*James Arcus*, H.C., 25th June, 1844, 2 Broun 239).

prisoner is, upon a second application, setting forth that the legal time is elapsed, entitled to his freedom under the same penalty.(j)

Precognition  
in order to  
trial.

(86)

49. Upon one's committing any of the grosser crimes, it is usual for a justice of the peace, sheriff, or other judge, to take a precognition of the facts—*i.e.*, to examine those who were present at the criminal act upon the special circumstances attending it—in order to know whether there is ground for a trial, and to serve as a direction to the prosecutor how to set forth the facts in the libel; but the persons examined may insist to have their declarations cancelled before they give testimony at the trial.(k)

Method of pre-  
senting to the  
Circuit Courts.

Justices of the peace, sheriffs, and magistrates of boroughs are also authorised to receive informations concerning crimes to be tried in the Circuit Courts; which informations are to be transmitted to the justice-clerk forty days before the sitting of the respective courts. This method of taking up a dittay is substituted (by 8 Anne, c. 16, §§ 3, 4) in place of the old one, by the stress (traistis) and porteous rolls mentioned 1487, c. 99; see Skene, *voce* "Traistis."(l) To discourage groundless criminal trials, all prosecutors, where the defender was absolved, were condemned in costs, as they should be modified by the judge (1587, c. 87), and besides, were subjected to a small fine, to be divided between the fisk and the defender; and where the King's Advocate was the only pursuer, his informer was made liable in the payment thereof (1579, c. 78). These statutes sufficiently warrant the present practice of condemning vexatious prosecutors in a pecuniary mulct, though far exceeding the statutory sum.(m)

Penalty of  
vexatious  
prosecutions.

(87)

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(j) And he cannot be again incarcerated for the same offence, except under "Last Criminal Letters." See Macd., 2nd ed., 269, 271.

(k) The precognition is generally taken by the procurator-fiscal alone, but it is competent to put the persons precognosed upon oath, and when this is done the intervention of a magistrate is necessary.

(l) The provisions of 8 Anne, c. 16, here mentioned, are repealed by 9 Geo. IV. c. 29, which enacts that all crimes may be tried before any Circuit Court by indictment, in the same manner as before the High Court.

(m) Not only are persons unwarrantably lodging criminal information

50. The forms of trial on criminal accusations differ much from those observed in civil actions, if we except the case of such crimes as the Court of Session is competent to, and of lesser offences tried before inferior courts. The trial of crimes proceeds either upon indictment, which is sometimes used when the person to be tried is in prison; or by criminal letters issuing upon the signet of the Justiciary. In either case the defender must be served with a full copy of the indictment or letters, and with a list of the witnesses to be brought against him, and of the persons who are to pass on the inquest (1672, c. 16, § 11, *concerning the Justice Court*); and fifteen free days must intervene between his being so served and the day of appearance.<sup>(n)</sup> When the trial proceeds upon criminal letters, the private prosecutor must give security, at raising the letters, that he will report them duly executed to the Justiciary, in terms of 1535, c. 35; and the defender, if he be not already in prison, is by the letters required to give caution, within a certain number of days after his citation, for his appearance upon the day fixed for his trial. And if he gives none within the days of the charge, he may be denounced rebel, which infers the forfeiture of his moveables.

Trial either by indictment or criminal letters.

Caution to be found by the private prosecutor;

by the defender.

51. Formerly accomplices in crime, or associates, were

Accomplices must be inserted in the letters.

liable in civil actions for reparation, but procurators-fiscal may also be found liable in damages where proceedings have been very irregular and have failed, though only on review by suspension in the Justiciary Court.

(88)

(n) Under the recent Court of Justiciary Act (31 & 32 Vict. c. 95), an accused person *may* be cited to appear in the Court of Justiciary at two diets, and may be called upon at the first diet to plead guilty or not guilty (§ 4), and to have objections to relevancy of the libel disposed of. Witnesses and jurors are not to be cited for the first diet, which must be at least fifteen days after the service of the libel, and there must be an interval of at least ten days between the two diets (*ibid.*). The list of assize must be served on the panel at least six days previous to the second diet (§ 6). Observe that the enactment as to the two diets is only permissive. In the sheriff-courts, however, in all criminal cases not tried summarily, the will of the libel *must* contain two diets,—the first of these, which is only a pleading diet, being not earlier than five days after the service, and the second not earlier than nine clear days after the first diet (16 & 17 Vict. c. 80, § 35). Summary prosecutions are regulated by 27 & 28 Vict. c. 53.

not cited in virtue of any special warrant contained in the criminal letters; their names were only inserted in a bill or writing to which the letters referred, and might be struck out at the messenger's pleasure. As messengers by an abuse of this trust frequently suffered delinquents to escape for money, it was enacted by 1579, c. 76, that all the persons to be cited should be specially mentioned in the body of the criminal letters.

Criminal  
letters must  
be special;

(89)

52. That part of the indictment, or of the criminal letters, which contains the ground of the charge against the defender, and the nature or degree of the punishment he ought to suffer, is called the libel. All libels must be special, setting forth the particular facts inferring the guilt, and the particular place where these facts were done. The time of committing the crime may be libelled in more general terms, with an alternative as to the month or day of the month.<sup>(o)</sup> But the defender will be allowed to prove that upon certain days of the time libelled he was *alibi*; and on such proof the libel cannot strike against him as to these days. The necessity of special libels obtained in our former law, not only in the trial of principal criminals, but of accessories; but as it was not practicable in most cases to libel upon the precise circumstances of accession that might appear in proof, libels against accessories were declared sufficient if they mentioned in general that the persons prosecuted were guilty art and part (1592, c. 153).

except against  
accessories.

Letters of  
exculpation.

(90)

53. The defender in a criminal trial may raise letters of exculpation, for citing witnesses in proof of his defences against the libel, or of his objections against any of the jury or witnesses; which letters must be executed to the same day of appearance with that of the indictment or criminal letters. As the right of the defender to prove his defences ought to be as ample and extensive as that of the pursuer to prove his libel, letters of exculpation ought not to be refused on any relevant defence, though such defence should be inconsistent with the libel; otherwise libels might be so

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(o) A latitude of three months is usually taken and allowed. In some offences, from their nature, a longer period may be required.

laid as to cut off the defender from every article of exculpation.<sup>(p)</sup>

54. The diets of appearance in the Court of Justiciary are peremptory: the criminal letters must be called on the very day to which the defender is cited (1587, c. 79); and hence, if no accuser appears, their effect is lost, *instantia perit*, and new letters must be raised.<sup>(q)</sup> If the libel or any of the executions shall to the prosecutor appear informal, or if he be diffident of the proof, from the absconding or absence of a necessary witness, the Court will, upon a motion made by him, desert the diet *pro loco et tempore*; after which new letters become also necessary. A defender who does not appear on the day to which he is cited is declared fugitive; in consequence of which his single escheat falls.<sup>(r)</sup> The defender, after his appearance in Court, is called the pannel.

Diets of appearance peremptory. Deserting the diets.

55. The two things to be chiefly regarded in a criminal libel are—(1.) the relevancy of the facts—i.e., their sufficiency to infer the conclusion; (2.) their truth. The consideration of the first belongs to the judges of the Court; that of the other to the jury or the assize. In trials before the Justiciary, after hearing counsel on both sides upon the relevancy, informations *hinc inde* were, by 1695, c. 4, directed to be offered to the Court. But by the late Jurisdiction Act (20 Geo. II., § 41), the judges, after the pleading, and minutes thereof made by the clerk, may forthwith pronounce their interlocutor; reserving power to themselves, in cases of difficulty, to direct informations, either on the relevancy of the libel, the import of a special verdict, the degree of punishment, or any other matter that may be alleged for the pannel before judgment.

Form of determining the relevancy; (91)

without written informations.

56. If the facts libelled be found irrelevant, the pannel is dismissed from the bar; if relevant, the Court remits him

Assize, (92)

(p) Now the accused lodges special defences—as when he undertakes to prove an *alibi*—and he is entitled to adduce witnesses in defence, provided due notice is given to the prosecutor.

(q) Adjournments must also be to fixed days (see § 66, note f; Macd., 2nd ed., 459).

(r) But the sentence of fugitation or outlawry may be recalled if the accused presents himself for trial (Macd., 2nd ed., 463, 464).

or jury.

to the knowledge of an assize. The word *assize* (from *assis*, settled or established) has different significations: it is sometimes taken for the sittings of a Court; sometimes for its regulations or ordinances; especially those that fix the standard of weights and measures; and it sometimes signifies a jury, either because juries consisted of a fixed determinate number, or because they continued sitting till they pronounced their verdict (see Skene, *voce Assisa*). A jury or assize consists of fifteen sworn men (*juratores*), picked out by the Court from a greater number, not exceeding forty-five (1579, c. 76; 1587, c. 88), who have been summoned for that purpose by the sheriff, and given in a list to the defender at serving him with a copy of his libel.(e)

All proper crimes must be tried by a jury.

(93)

57. Anciently no person could be convicted of the smallest offence till he was found guilty by a jury of his countrymen; and though now, for more than a century backwards, inferior judges have tried lesser breaches of the peace *de plano*, yet to this day all prosecutions of a higher nature, whether before the supreme or inferior criminal Courts, must proceed by jury; and no trial, even for a bloodwit, if pursued before the Justiciary, can be carried on without a jury. In the trial of crimes competent to the Court of Session, the fifteen judges may well be considered in the character both of Court and of jury.

Probation of crimes.

(94-100)

Oath of party.

58. Crimes cannot, like debts, be referred to the defender's oath, for no person is compellable to swear against himself where his life, limb, liberty, or estate is concerned, nor even in crimes which infer infamy, because one's good name is, in right estimation, as valuable as his life. The law is, however, forced in the crime of usury,(f) to depart from some of its common rules, that the crime may be brought to light.

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(e) The chief Acts regulating the qualifications and selection of jurors in criminal cases (who may now be cited by registered post letter; 31 and 32 Vict. c. 95, § 10) are 6 Geo. IV. c. 22, and 1 & 2 Vict. c. 119, § 27. As to time for serving jury-list when accused is cited to two diets in the High Court, see *ante*, § 50, note (n). Both the public prosecutor and the accused may challenge jurors on cause shown, besides being entitled to five peremptory challenges.

(f) See *ante*, § 42, note (b).

Where the usury is founded on a written obligation in the hands of the defender, the pursuer may, by an exhibition force him to produce it in evidence of the crime, contrary to the rule *Nemo tenetur edere instrumenta contra se*: and where it is not founded upon writing, the crime may be proved by the usurer's own oath, notwithstanding the rule *Nemo tenetur jurare in suam turpitudinem* (1600, c. 7). Crimes, therefore, are in the general case provable only by the defender's free confession, or by writing, or by witnesses. Extrajudicial confession. No extrajudicial confession, unless it is adhered to by the pannel in judgment, can be admitted as evidence; (*u*) for the whole proof must be deduced in open Court, in presence of the assize or jury, as well as of the pannel (1587, c. 90). A Judicial confession. judicial confession ought to be received with all the qualities that the pannel has thought fit to adject to it; so that the prosecutor who pleads upon one part of it must admit the whole. Proof by writing. Proof by writing is seldom used but in usury, forgery, and perjury. Though in deforcement the written execution of the messenger or officer is sufficient evidence of the violence in all civil questions concerning the validity of the diligence till it be declared false, yet, in a criminal trial moved against the deforcers, the messenger's execution, who is a party interested in the prosecution, is not regarded.

59. All objections relevant against a witness in civil cases are also relevant in criminal. (*v*) No witness is admitted who may gain or lose by the event of the trial. (*w*) Hence, in the crime of usury the testimony of him who has given the unlawful profits is rejected, because he becomes a gainer by the conviction of the usurer (1600, c. 7). In deforcement the persons employed by the messenger to attest the execution are in some sense parties, violence being commonly used Proof by witnesses. Interested witnesses.

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(*u*) Evidence of extrajudicial admissions is constantly admitted unless there be evidence of their having been improperly drawn from the accused by officials. Declarations made before the magistrate before whom the accused is first brought may be used against the prisoner by the public prosecutor.

(*v*) For the changes in the law relative to the admissibility of witnesses, see notes to b. iv. t. ii., *supra*.

(*w*) The objection of interest is now abolished (15 & 16 Vict. c. 27, § 1).

against them as well as against the messenger; yet, as the proof of the crime would be frequently impracticable if the evidence were rejected, the law considers the messenger as the only party against whom the violence is intended, and therefore receives the testimony of the witnesses, though the *Socii criminis*, should be beaten. *Socii criminis*, or associates in the same crime, are not admitted against one another, except either in crimes against the State, as treason; in occult crimes, where other witnesses cannot be had, as forgery; or in thefts and depredations committed in the Highlands (21 Geo. II. c. 3 § 21).<sup>(x)</sup> The testimony of the private party injured may be received against the pannel where the King's Advocate is the only prosecutor, if from the nature of the crime there must needs be a penury of witnesses, as in rape, robbery, &c.

60. Where a crime is to be proved by several circumstances connected together, every one of which makes a part of the same criminal act, a single witness to each circumstance is sufficient evidence. But it may be doubted whether this ought to obtain in crimes reiterated by different criminal acts. For if a single witness should be deemed sufficient in such case for proof of each separate act, it would destroy one of the strongest checks by which the testimony of false witnesses may be controlled (see 7 Gul. III. c. 3, § 4). Formerly the depositions of witnesses in all trials before the criminal court were reduced into writing; but that practice is abolished by 21 Geo. II. c. 19, unless where the libel concludes death or demembration.<sup>(y)</sup> Crimes which by their nature hardly admit direct evidence may be proved by presumptive; and these presumptions ought, from the severity of the conclusions in criminal trials, to be so pregnant as necessarily to

Must two witnesses concur to each act?

Proof by presumption.

<sup>(x)</sup> *Socii criminis* are now in all cases admissible witnesses, their credibility being subject of observation to the jury (Hume, ii. 367). A *socius* taken as a witness by the public prosecutor cannot be afterward tried for the offence. Whether every witness called by the Crown is exempt from prosecution for the offence in regard to which he is examined is a question upon which there is a difference of opinion; see Debate in House of Commons (Appendix to 4 Irv.).

<sup>(y)</sup> Even in these cases the practice has been abolished, but the judge must still take notes of the evidence led.

carry conviction along with them. But where a crime is to be tried only *ad civilem effectum*—e.g., where a process of adultery is brought for obtaining a divorce—more slender presumptions will be received; so that the same proof that has been judged sufficient for procuring a divorce before the commissaries may be cast if the crime should be afterwards tried criminally.

61. After all the witnesses have been examined in Court, the assizers are shut up in a room by themselves, where they must continue excluded from all correspondence,<sup>(z)</sup> till their verdict or judgment be subscribed by the foreman (or chancellor) and clerk (1587, c. 94; 1672, c. 16, art. 38, *concerning the Justice Court*);<sup>(a)</sup> and according to this verdict the Court pronounces sentence, either absolving or condemning. It is not necessary by the law of Scotland that a jury should be unanimous in finding a person guilty; the narrowest majority is as sufficient against the pannel as for him. Juries cannot be punished on account of an erroneous verdict, either for or against the pannel; but they might, by our former law, for absolving him against clear evidence. This crime of wilful error in an assize was tried by a grand assize, consisting of twenty-five gentlemen possessed of land-estates; and was punished by imprisonment for a year, forfeiture of moveables, and infamy (*Reg. Maj.*, l. 1, c. 14, § 2 *et seq.*; 1475, c. 64). But these assizes of error have been at no period much in use (see Skene, *voce Assisa*); and they are declared a grievance by the Convention of Estates (1689, c. 18).

(101)  
Verdict of  
assize.

Error of assize.

62. Though the proper business of a jury be to inquire into the truth of the facts found relevant by the Court, for which reason they are sometimes called the inquest, yet in many cases they judge also in matters of law or relevancy. Thus, though an objection against a witness should be re-

Powers of a  
jury in matters  
of law.

(z) See *M'Garth v. Bathgate*, H.C., May 15, 1869, 41 Sc. Jur. 442, where a sentence was suspended because the sheriff had during the trial "adjourned the diet" without making any provision in his interlocutor for the seclusion and surveillance of the jury.

(a) The verdict is now announced *vidē voce* by the chancellor, and taken down by the clerk of court; and written verdicts are practically obsolete.

General and  
special verdict.

pelled by the Court, the assizers are under no necessity to give more credit to his testimony than they think just. And in all trials of art and part, where special facts are not libelled, the jury, if they return a general verdict, are indeed judges, not only of the truth, but of the relevancy of the facts that are sworn to by the witnesses. A general verdict is that which finds in general terms that the pannel is guilty or not guilty, or that the libel or defences are proved or not proved. In a special verdict the jury finds certain facts proved, the import of which is to be afterwards considered by the Court.<sup>(b)</sup>

Sentences  
within what  
time to be  
executed.

(102)

63. By our old law the sheriff was confined to a definite time in pronouncing and executing sentence on certain criminals. When a murderer was taken red-hand—*i.e.*, apprehended in the criminal act—it behoved the sheriff not only to try him, but to execute the sentence within three suns; whereas if he was apprehended *ex intervallo*, forty days were allowed for that purpose (1426, c. 90; 1491, c. 28). It was afterwards provided (by 1695, c. 4), that in all cases where the sheriff was tied down to do justice in three suns, sentence might be executed at any time within nine days, provided it had been pronounced within three. But by our present law criminal judges not only may, but must, suspend for some time the execution of such sentences as affect life or limb, so that condemned criminals whose cases deserve favour might have access to apply to the King for mercy. No sentence of any court of judicature south of the River Forth, importing either capital or corporal punishment, could be executed in less than thirty days; and, if north of it, in less than forty, after the date of the sentence, by 11 Geo. I. c. 26, § 10. This Act, in so far as it concerns corporal punishments less than death or dismembering—*e.g.*, whipping, pillory,<sup>(c)</sup> &c.—is altered, so that judges may now inflict these eight days after sentence on this side Forth, and twelve days after sentence beyond it (3 Geo. II. c. 32).<sup>(d)</sup>

(b) Questions of difficulty may be certified from circuit to the High Court, but to a fixed day. See below, § 66, note (f).

(c) Abolished (7 Will. IV. & 1 Vict. c. 23).

(d) The periods within which capital sentences must now be exe-

**64.** Crimes are extinguished—(1.) By the death of the criminal; both because a dead person can make no defence, so that his trial is truly a judging upon the hearing of one side; and because, though his guilt should be ever so notorious, he is after death carried beyond the reach of human penalties, and consequently continues no longer an object of correction, which is one of the great purposes of punishment. Such trials, therefore, can have no effect but to punish the innocent heir, contrary to that most equitable rule *Culpa tenet suos auctores*. (2.) Crimes may be extinguished by a remission from the Sovereign. But a remission, though it secures a delinquent from the public resentment, the exercise of which belongs to the Crown, cannot cut off the party injured from his claim of damages, over which the Crown has no prerogative. Agreeably to this distinction, no person was allowed to plead a remission till he had given security to satisfy the private party (1457, c. 74; 1528, c. 7); and in the case of slaughter, it behoved the wife or the executors of the deceased, who were entitled to that satisfaction, or, as it is called in the style of our statutes, *assythment*, to sign letters of *sluins*, acknowledging that they had received satisfaction, before any remission could be granted to the slayer (1592, c. 155, No. 1; 1593, c. 174). Whoever, therefore, founds on a remission, is liable in damages to the private prosecutor, in the same manner as if he had been tried and found guilty. Even general acts of indemnity passed in Parliament, though they secure against such penalties as law inflicts upon the criminal, merely *per modum pœnæ* (*Stuart v. Haliburton*, July 1, 1713, M. 6829), yet do not against the payment of any pecuniary fine which is given by statute to the party injured (*Robertson v. Robertson*, Feb. 22, 1712, M. 6827), nor, consequently, against the demand of any claim competent to him in name of damages.

**65.** Lesser injuries, which cannot be properly said to affect the public peace, may be extinguished either by the

cuted are not less than fifteen or more than twenty-one days after, if south of the Forth; and not less than twenty or more than twenty-seven days if north thereof (11 Geo. IV. & 1 Will. IV. c. 37). Ordinary sentences run from their date.

Extinction  
of crimes by  
death;

(103)

by remission.

(105-7)

Acts of in-  
demnity.

Extinction by  
the party's for-  
giving the  
offence;

(108)

private party's expressly forgiving them, or by his being reconciled to the offender after receiving the injury. Hence arises the rule *Dissimulatione tollitur injuria*. But where the offence is of a higher nature, the party injured, though he may pass from the prosecution in so far as his private interest is concerned, cannot preclude the King's Advocate or procurator-fiscal from insisting *ad vindictam publicam*.

by prescrip-  
tion.

(109)

Short prescrip-  
tion of certain  
crimes by  
statute ;

(110)

without  
statute.

66. Crimes are also extinguished by prescription, which operates by the mere lapse of time without any act either of the Sovereign or of the private sufferer. Crimes prescribe both by the Roman law (l. 12, *C. ad leg. Corn. ad fals.* 9, 22), and by the custom of Scotland (see Macken. Crim., tit. Prescription), (e) in twenty years ; but in particular crimes the prescription is limited by statute to a shorter time. No person can be prosecuted upon the act against wrongous imprisonment after three years (1701, c. 6). High treason committed within His Majesty's dominions suffers likewise a triennial prescription if indictment be not found against the traitor by a grand jury within that time (7 Gul. III. c. 3, § 5). All actions brought upon any penal statute made or to be made, where the penalty is appropriated to the Crown, expire in two years after committing the offence ; and where the penalty goes to the Crown or other prosecutor, the prosecutor must sue within one year, and the Crown within two years after that year ended (31 Eliz. c. 5). And this, though an English Act, affects Scotland, as it limits all the penal British statutes passed since the Union which concern this part of the United Kingdom. Certain crimes are, without the aid of any statute, extinguished by a shorter prescription than twenty years. By our old law (*Reg. Maj.*, l. 4, c. 10), in the cases of rape, robbery, and haimsucken, the party injured was not heard after a silence of twenty-four hours, from a presumption that persons could not be so grossly injured without immediately complaining. And it is probable that a prosecution for these crimes, if delayed for any considerable time, would be cast even at this day, or at

(e) See also the noted case of *Calum Macgregor*, 1773, M. 11, 146 ; Maclaurin, pp. 595, 773 ; Hume, ii. 136-7 ; Maed., 2nd ed., 273, 274.

least the punishment restricted. Lesser injuries suffer also a short prescription; law *presuming* forgiveness from the nature of the offence and the silence of the party. The particular space of time sufficient to establish this presumption must be determined by the judge according to circumstances.(f)

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(f) That the case has already been brought to proof against the accused, or, in technical language, that he has "tholed an assize," is a good plea in bar of trial (Hume, ii. 465-6, and case of *John Hannah*, 1806, there referred to, p. 446, note 1). The previous trial must, however, have been truly for the same offence, and regular; so rigidly is this rule enforced, that where a verdict of guilty had been returned, but a question as to the admission of evidence was certified to the High Court but not to a fixed day (see above, § 54), the pannels were liberated, and were afterwards held to have tholed an assize when charged on a new indictment for the same offence (*Andersons*, 1852, 1 Irv. p. 66). Inst. b. iv.  
t. iii. § 104.



1. [REDACTED]

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

5. [REDACTED]

6. [REDACTED]

7. [REDACTED]

8. [REDACTED]

9. [REDACTED]

10. [REDACTED]

11. [REDACTED]

12. [REDACTED]

13. [REDACTED]

14. [REDACTED]

15. [REDACTED]

16. [REDACTED]

17. [REDACTED]

18. [REDACTED]

19. [REDACTED]

20. [REDACTED]

21. [REDACTED]

22. [REDACTED]

23. [REDACTED]

24. [REDACTED]

25. [REDACTED]

26. [REDACTED]

27. [REDACTED]

28. [REDACTED]

29. [REDACTED]

30. [REDACTED]

31. [REDACTED]

32. [REDACTED]

33. [REDACTED]

34. [REDACTED]

35. [REDACTED]

36. [REDACTED]

37. [REDACTED]

38. [REDACTED]

39. [REDACTED]

40. [REDACTED]

41. [REDACTED]

42. [REDACTED]

43. [REDACTED]

44. [REDACTED]

45. [REDACTED]

46. [REDACTED]

47. [REDACTED]

48. [REDACTED]

49. [REDACTED]

50. [REDACTED]

51. [REDACTED]

52. [REDACTED]

53. [REDACTED]

54. [REDACTED]

55. [REDACTED]

56. [REDACTED]

57. [REDACTED]

58. [REDACTED]

59. [REDACTED]

60. [REDACTED]

61. [REDACTED]

62. [REDACTED]

63. [REDACTED]

64. [REDACTED]

65. [REDACTED]

66. [REDACTED]

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71. [REDACTED]

72. [REDACTED]

73. [REDACTED]

74. [REDACTED]

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81. [REDACTED]

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83. [REDACTED]

84. [REDACTED]

85. [REDACTED]

86. [REDACTED]

87. [REDACTED]

88. [REDACTED]

89. [REDACTED]

90. [REDACTED]

91. [REDACTED]

92. [REDACTED]

93. [REDACTED]

94. [REDACTED]

95. [REDACTED]

96. [REDACTED]

97. [REDACTED]

98. [REDACTED]

99. [REDACTED]

100. [REDACTED]

## APPENDIX.



## APPENDIX.

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### I. CHARTER OF DAVID I. (1124-1153).

David, King of the Scots, to all good men of his whole land, French and English and Galwegians : Greeting, Know that I have given and granted to Robert of Brus, in fee and heritage, to him and his heir, the valley of Anant in forest, on both sides of the water of Anant, as the marches are from the forest of Seleschirche as far as his land extends towards Stradnitt and towards Clud, freely and quietly as any other forest of his is best and most freely held. Whereupon I forbid that any one hunt in the aforesaid forest unless by his authority, on pain of forfeiture of ten pounds, or that any one go through the aforesaid forest, unless by a straight road appointed. Witnesses, Walter the Chancellor, Hugh of Moreuill, and Walter son of Alan, and Odenell of Umframuell, and Walter of Sandesci, and Richard of Moreuill. At Strap... rtune.

### II. CHARTER OF REIGN OF MALCOLM IV. (1153-1165).

Waldevus son of Cospatric, to all his good men and all his friends present and to come, Greeting : Know ye that I have given and granted, and by this my charter, confirmed to Helias son of Huctred Dundas, for half a knight's service, to be held by him and his heirs of me and of my heirs, in fee and heritage in moors, in waters, in stanks, in mills, in meadows, in pastures, with all its right, marches, and pertinents : I grant, therefore, and will and charge, that the aforesaid Helias have and hold that land so quietly, and so freely, and so honourably as no man holds of a baron more freely and quietly and honourably in all the land of the King of Scotland. Before these witnesses, John son of Orm, Walden son of Baldewin, Robert of St. Michael, Helias of Hadestanden, William of Copland, William of Hellebet, Alden the Steward, Gerary the Knight, John of Gragin.

Both of these documents originally had seals attached. They are taken from the National MSS. of Scotland, Part I. pp. 12 and 18.

*Form in use prior to Legislation of 1847.*

HAVE SOLD, ALIENATED, and in feu-farm disposed, these presents, SELL, ALIENATE, and in feu-farm DISPOSE my heirs and successors, to and in favour of the said B, and assignees whomsoever, heritably and irredeemably WHOLE the lands of [*describe the lands*], lying within the \_\_\_\_\_ and shire of \_\_\_\_\_, together with the teinds, both parsonage and vicarage, thereof, and parcels, and pertinents of the same ;

GIVING therefore, yearly, the said B, and his foresaid lands and others above disposed, to me and my foresaid diate lawful superiors of the same, the sum of £ in name of feu-duty, at two terms in the year, Whitsun Martinmas, by equal portions, beginning the first term's thereof at Whitsunday next, for the half-year preceding forth thereafter at the said two terms in the year, in coming ; and DOUBLING the said feu-duty the first year of t of each heir and singular successor to the lands and others and these for all other burden, exaction, demand, or secular whatsoever, which can be anyways exacted for the lands and foresaid, or any part thereof, in all time coming :

WHICH LANDS, TEINDS, and others above disposed, with  
feu-right, and the infeftment to follow hereon, I BIND and  
me and my foresaids, to WARRANT to the said B and his f  
at all hands, and against all mortals :

AND FURTHER, I hereby make and constitute the said B and his foresaids, my cessioners and assignees, in and to the whole writs and evidents, rights, titles, and securities of the said lands and others granted in favour of me, my authors and predecessors, and that to the effect of maintaining and defending the said B and his foresaids in the right of the lands and others hereby conveyed ; and as the same cannot be herewith delivered up, I oblige myself and my foresaids to make the same forthcoming to the said B and his foresaids, whenever they have occasion for the same, and that upon a proper receipt and obligation for redelivery within a reasonable time, under a suitable penalty ; AS ALSO I hereby assign, transfer, and make over to the said B and his foresaids, the rents, maills, and duties of the said lands and others, from and after the term of \_\_\_\_\_ next, which is hereby declared the term of his entry to the premises, and in all time coming, with power to call, sue for, uplift, and discharge the same ;

WHICH assignation I BIND and OBLIGE myself and my foresaids to warrant as follows—viz., in so far as concerns the writs and evidents, at all hands and against all mortals ; and in so far as concerns the rents, maills, and duties, from my own facts and deeds only ;

AND FURTHER, I hereby BIND and OBLIGE me and my foresaids to free and relieve the said B and his foresaids of all cess, minister's stipend, and other public and parochial burdens exigible furth of the said lands and others, preceding the said term of \_\_\_\_\_, the said B and his foresaids being bound to free and relieve me and my foresaids of the same in all time thereafter ;

AND I CONSENT to the registration hereof in the books of Council and Session, therein to remain for preservation ; and for that purpose constitute \_\_\_\_\_, my procurators, &c.

MOREOVER, I hereby DESIRE and REQUIRE you \_\_\_\_\_, and each of you, my bailies in that part hereby specially constituted, that on sight hereof ye pass to the ground of the said lands and others, and there give and deliver to the said B, or his foresaids, heritable state and sasine, with real, actual, and corporal possession, of ALL and WHOLE the lands, teinds, and others particularly above specified, with the parts and pertinents thereto belonging, lying, and described as aforesaid, and here held as repeated *brevitatis causa*, to be holden in manner foresaid, and for payment of the feu-duties before specified ; and that by delivering to the said B or his foresaid, or to his or their attorney, in his

or their names, bearers hereof of earth and stone of the gr  
the said lands, and a handful of grass and corn for the said  
with all other symbols usual and necessary ; and this in t  
ye leave undone ; WHICH to do, I COMMIT to you and each  
my bailies in that part foresaid, my full power by this my p  
of sasine directed to you for that effect :

IN WITNESS WHEREOF, these presents, written upon th  
the preceding pages of stamped vellum, by C  
to D, are subscribed by me at the  
of one thousand eight hundred and  
before these witnesses E and F.

(Signed)

(Signed) E, *witness.*

( „ ) F, *witness.*

#### IV.—DISPOSITION

AS UNDER CONSOLIDATION ACT, 1868,  
31 & 32 VICT., CAP. 101, SCHED. B.

I, A, heritable proprietor of the lands and others here  
disposed, in consideration of the sum of £ stg. ins  
paid to me by B as the price thereof, do hereby dispo  
favour of the said B, and his heirs and assignees whom  
heritably and irredeemably, all and whole the lands . . . (a)  
in the parish of Y, and county of Z, together with the per  
of the said lands, and my whole right, title, and interest, p  
and future, therein, with entry at the term of [*here speci*  
*date of entry*] [(b) to be holden the said lands and others [*or su*  
a me [*or a me vel de me, as the case may be*] ; and I resign th  
lands and others [*or subjects*] for new infeftment or invest  
and I assign the writs, and have delivered the same accord  
inventory ; and I assign the rents ; and I bind myself to fr  
relieve the said dispo  
ties, and public burdens ; and I grant warrandice ; and I c  
to registration hereof for preservation [*or for preservation*  
execution]. IN WITNESS WHEREOF [*insert a testing clause*  
*usual form*].

(a) Instead of describing the lands or inserting burdens to whic  
are subject, they *may* be referred to as described or specified in  
viously recorded deed. There are statutory forms for such referer

(b) Since the Act of 1874 there is no room for these clauses.

## V.—BOND AND DISPOSITION IN SECURITY.

31 &amp; 32 VICT., CAP. 101, SCHED. FF, No. 1.

I, *A B* [*here name and design the granter*], grant me to have instantly borrowed and received from *C D* [*here name and design the creditor*], the sum of [*insert the sum*] sterling; which sum I bind myself, and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay to the said *C D*, his executors [*or his heirs, excluding executors*] or assignees whomsoever, at the term of [*here insert the date and place of payment*], with a fifth part more of liquidate penalty in case of failure, and the interest of said principal sum at the rate of                      per centum per annum from the date hereof to the said term of payment, and half-yearly, termly, and proportionally thereafter during the not-payment of the same, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of                      next, for the interest due preceding that date, and the next term's payment thereof at                      following, and so forth half-yearly, termly, and proportionally thereafter during the not-payment of the principal sum, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof. And in security of the personal obligation before written, I dispoise to and in favour of the said *C D* and his foresaids, heritably, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, all and whole [*here describe or refer as in Schedule (E) or Schedule (G) to the lands*],<sup>(c)</sup> and that in real security to the said *C D* and his foresaids of the whole sums of money above written, principal, interest, and penalties; and I assign the rents; and I assign the writs; and I grant warrandice; and I reserve power of redemption; and I oblige myself for the expenses of assigning and discharging this security; and on default in payment I grant power of sale; and I consent to registration for preservation and execution. IN WITNESS WHEREOF, &c. [*insert a testing clause in usual form*].

(c) If the lands are held under any real burdens, conditions, provisions, or limitations, insert them here or refer to them in or as nearly as the circumstances may require in the form of Schedule (D).

A.D. 1874.

## VI.—CONVEYANCING ACT, 1874.

37 &amp; 38 VICTORIA REGINÆ, CAP. 94.

## SECTION 4.

When lands have been feued, whether before or after commencement of this Act,—

Renewal of investiture abolished.

- (1.) It shall not, notwithstanding any provision, declaration or condition to the contrary in any statute in force at the passing of this Act, or in any deed, instrument in writing, whether dated before or after the passing of this Act, be necessary in order to the completion of the title of any person having a right to the lands in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or writ by progress; and it shall not be competent for the superior in any case to grant any such charter, precept, or other writ by progress: Provided always, that nothing in this Act contained shall prevent the granting of charters of novodamus or precepts or writs from Chancery or of clare constat, or writs of acknowledgment:

Infetment to imply entry with superior.

- (2.) Every proprietor who is at the commencement of this Act or thereafter shall be duly infet in the lands shall be deemed and held to be, as at the date of the registration of such infetment in the appropriate register of sasines duly entered with the nearest superior whose estate is of superiority in such lands would according to the law existing prior to the commencement of this Act have been not defeasible at the will of the proprietor so infet, to have the same effect as if such superior had granted a writ of confirmation according to the existing law and practice, and that whether the superior's own title or that of his over-superior has been completed or not, but such implied entry shall not be held to confer or conform any right more extensive than those contained in the original charter of feu-right of the lands or in the last charter or other writ by which the vassal was entered therein: Provided always, that nothing herein contained shall be held to validate any subfeu in cases where subinfeudation has been effectually prohibited; and provided further,

notwithstanding such implied entry, the proprietor last entered in the lands, and his heirs and representatives, shall continue personally liable to the superior for payment of the whole feu-duties affecting the said lands, and for performance of the whole obligations of the feu, until notice of the change of ownership of the feu shall have been given to the superior ; but without prejudice to the superior having all his remedies against the entered proprietor under the entry implied by this Act, and without prejudice also to the right of the proprietor last entered in the lands and his foresaids to recover from the entered proprietor of the lands all feu-duties which such proprietor last entered in the lands or his foresaids may have had to pay in consequence of any failure or omission to give such notice ; and for this purpose all the remedies competent to the superior for recovery of feu-duties shall by virtue of this Act be held to be assigned to the proprietor last entered in the lands and his foresaids to the effect of enabling them to recover payment of any sum so paid by them as aforesaid, but that always under reservation of, and without prejudice to the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to him ; and such notice may be in the form of Schedule A. hereto annexed, or as nearly in that form as the circumstances in each particular case will permit. In the event of the proprietor last entered in the lands or his foresaids desiring to preserve evidence of his or their having sent such notice, it shall be sufficient if a copy of such notice, certified by the sender thereof as having been delivered or put into the post-office by him in presence of two witnesses, who shall also subscribe the certificate, is preserved, or that the notice is acknowledged by the superior or his agent to have been received, either on a duplicate thereof or by a separate acknowledgment, and the superior or his agent on receiving such intimation in duplicate, with a fee of five shillings, shall, if required, be bound to return one of the copies with an acknowledgment of intimation thereon subscribed by him :

A.D. 1874.

- (3.) Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or

Implied entry  
not to affect  
rights of

A.D. 1874.

superiors to  
feu-duties, &c.Action in lieu  
of declarator of  
non-entry.

arrears of feu-duties which may be due or exigible in respect of the lands, at or prior to the date of such action, and all rights and remedies competent to a superior under the existing law and practice or under the provisions of any feu-right, for recovering, securing, and effecting such casualties, feu-duties, and arrears, and for irritating the feu ob non solutum canonem, and for enforcing obligations and conditions in the feu-rights prior to the date of such action, or exigible by the superior, in so far as the same have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming; but nevertheless, that such implied entry shall not entitle the superior to demand any casualty sooner than it would have been due by the law prior to this Act or by the condition of the feu-right, have required the vassal to enter or to pay the same casualty irrespective of his entering:

- (4.) No lands shall, after the commencement of this Act, be deemed to be in non-entry, but a superior who was entitled to sue for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, and to raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator of non-entry, and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleaded in defence against such action; and any decree for declarator in such action shall have the effect of and operate as a decree of declarator of non-entry, according to the provisions of the existing law, but shall cease to have such effect as to the payment of such casualty, and of the expenses incurred in such action, contained in said decree; but such payment shall not prejudice the right or title of the superior to the lands, or to the feu-duties due for the period while he is in possession of the lands, or under such decree nor to any feu-duties or arrears of feu-duties which may be due or exigible at or prior to the date of such payment, or the rights and remedies competent to him under the existing law and practice for recovering, securing, and effecting the same; and the summons in such action may be in or as nearly as may be in the form of Schedule B. hereto annexed.

## FOREIGN BILL OF EXCHANGE.

£500

DURBAN, 12th May, 1881.

At \_\_\_\_\_ days after sight, pay this first of exchange  
 STAMP. (second and third of same tenor and date unpaid) to the  
 order of Mr. E. F. Five hundred pounds sterling. Value  
 received.

To C. D.,  
 High Street, Edinburgh.

A. B.

## INLAND BILL.

£100

EDINBURGH, 12th May, 1881.

Two months after date, pay Mr. G. H., or order. One  
 STAMP. hundred pounds. Value received.

M. N.

To K. L.,  
 Merchant, Leith.

## PROMISSORY NOTE.

£50

GLASGOW, 12th May, 1881.

Two months after date, I promise to pay Messrs.  
 STAMP. P. & R., or order, Fifty pounds. Value received.

T. U.

## BANK CHEQUES.

STAMP. To the Treasurer of the  
 Bank of Aberdeen.

12th May, 1881.

Pay to \_\_\_\_\_, or bearer, the sum of Twenty-five pounds.  
 £25 V. W.

To O. X.

12th May, 1881.

I O U

Fifteen pounds sterling.

Y. Z.

a\*

LEITH.

said Merchant (if the ship is not sooner despatched) for  
or unloading the said ship at  
and days on demurrage over and  
the said lying days, at pounds per day.  
for non-performance of this agreement

upon the good ship or vessel called the \_\_\_\_\_, whereof

Master for this present voyage, and now lying in the port of  
 , and bound for being  
 marked and numbered as in the margin ; and are to be delivered  
 in like good order and well-conditioned at the aforesaid port  
 of , (the act of God, the Queen's enemies,  
 fire, and all and every other dangers and accidents of the seas,  
 rivers, and navigation, of whatever nature and kind, excepted),  
 unto or to  
 assigns ; he or they paying freight for the said  
 goods with  
 per cent. primage and average accustomed.—In witness whereof,  
 the Master or Purser of the said ship or vessel hath affirmed to  
 bills of lading, all of this tenor and  
 date ; one of which bills being accomplished, the others to stand  
 void.

Dated at  
 the day of , 188 .

## MARINE INSURANCE.

## STATUTORY FORM OF POLICY,

30 &amp; 31 VICT. c. 23, SCH. E.

“ BE IT KNOWN. , as well in own name, as Sec. 9.  
 for and in the name and names of all and every other person or  
 persons to whom the same doth, may, or shall appertain, in part or £  
 in all, doth make assurance, and cause , and them, and every  
 of them, to be insured, lost or not lost, at and from Delivered the  
 , upon any kind of goods and merchandise, of day  
 and also upon the body, tackle, apparel, ordnance, munition, artil- No.  
 lery, boat, and other furniture, of and in the good ship or vessel  
 called the , whereof is master, under God, for this  
 present voyage, , or whosoever else shall go for  
 master in the said ship, or by whatsoever other name or names the  
 said ship, or the master thereof, is or shall be named or called ;  
 beginning the adventure upon the said goods and merchandises  
 from the loading thereof aboard the said ship,  
 upon the said ship, &c., and so shall  
 continue and endure, during her abode there, upon the said ship, &c.  
 AND FURTHER, until the said ship, with all her ordnance, tackle,  
 apparel, &c., and goods and merchandises whatsoever, shall be

arrived at

upon the said ship, &c., until she hath moored at anchor two or three or four hours in good safety; and upon the goods and merchandise until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage to proceed and to, and touch and stay at any ports or places whatsoever,

without prejudice

to this insurance. The said ship, &c., goods and merchandise for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adverse

and perils which we the assurers are contented to bear, and do upon us in this voyage: they are of the seas, men-of-war, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, and ship, &c., or any part thereof. And in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandise, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we the assurers will contribute each one according to the rate and quantity of his share herein assured. And it is agreed by us the insurers that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance, by the assured,

at and after the rate of

"IN WITNESS WHEREOF, we the assurers have subscribed our names and sums assured in

"N.B.—Corn, fish, salt, fruit, flour, and seed, are warranted

free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under five pounds per cent., and all other goods ; also the ship and freight are warranted free from average under three pounds per cent. unless general, or the ship be stranded."

## INDICTMENTS.

A—— B—— or C——, now or lately prisoner in the prison of Glasgow, you are Indicted and Accused, at the instance of The Right Honourable EDWARD STRATHEARN GORDON, Her Majesty's Advocate for Her Majesty's interest : THAT ALBEIT by the laws of this and of every other well-governed realm THEFT is a crime of an heinous nature, and severely punishable : YET TRUE IT IS AND OF VERITY, that you the said A—— B—— or C—— are guilty of the said crime, actor, or art and part : IN SO FAR AS, on the

4th day of January 1874,

Sunday.

or on one or other of the days of that month, or of December immediately preceding, in or near the house or premises situated in Hyde Park Place, off Springburn Road, in or near Glasgow, then and now or lately occupied by G—— M——, labourer, residing there, you the said A—— B—— or C—— did, wickedly and feloniously, steal and theftuously away take

Banker's Notes for One Pound sterling each, the property or in the lawful possession of J—— L——, grocer and spirit-dealer, Springburn Road, Glasgow, and now or lately residing with the said G—— M—— : And you the said A—— B—— or C—— having been apprehended and taken before William Gillespie Dickson, Esquire, Advocate, then Sheriff Substitute, now Sheriff of Lanarkshire, did, in his presence at Glasgow, on the

5th day of January 1874,

emit a declaration, which was subscribed by him in your presence, you having declared that you could not write : Which Declaration, being to be used in evidence against you the said A—— B—— or C—— at your trial, will, for that purpose, be in due time lodged in the hands of the Clerk of the Circuit-Court of Justiciary before which you are to be tried, that you may have an opportunity of seeing the same : ALL WHICH, or part thereof, being found proven by the verdict of an Assize, or admitted by the judicial confession

of you the said A—— B—— or C——, before the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, in a Circuit-Court of Justiciary to be holden by them, by any one or more of their number, within the burgh of Glasgow in the month of April, in this present year 1874, you the said A—— B—— or C—— ought to be punished with the pains of law, to deter others from committing the like crimes in time coming.

ROBERT LEE, A.D.

*List of Witnesses, &c.*

A—— B—— and C—— D——, now or lately prisoners in the prison of Greenock, you are Indicted and Accused, at the instance of The Right Honourable EDWARD STRATHEARN GORDON, Her Majesty's Advocate for Her Majesty's interest: THAT ALBEIT the laws of this and of every other well-governed realm, ASSAULT especially when committed by a person who has been previously convicted of assault; as also ROBBERY, especially when committed by a person who has been previously convicted of theft; also THEFT, especially when committed by a person who has the habit and repute a thief, and who has been previously convicted of theft, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said A—— B—— are guilty of the said crime of assault, and of the said crime of robbery, or of the said crime of theft, or of one or more of the said crimes, actor, or art and part: and you the said C—— D—— are guilty of the crime of assault, aggravated as aforesaid, and of the said crime of robbery, aggravated as aforesaid, or of the said crime of theft, aggravated as aforesaid, or of one or more of said crimes, actor, or art and part: IN SO FAR AS, on the

2nd day of January 1874,

or on one or other of the days of that month, or of December immediately preceding, in or near the shop or premises situated in Cathca Street, Greenock, then and now or lately occupied by John M'Naughton, spirit-dealer there, you the said A—— B—— and C—— D—— did, both and each, or one or other of you, wickedly and feloniously attack and assault X—— Y——, now or lately residing in or near Royal Crescent, Glasgow, and did strike him one or more severe blows on or about the face, and did struggle with him, and you did, both and each, or one or other of you, then and there, wickedly and feloniously, and by force

and violence, take from the person or custody of the said X—— Y——, and rob him of

A Silver Gilt or Brass or other Metal Watch,

Two Bank or Banker's Notes for One Pound sterling each,  
and Eight Shillings or thereby in Silver Money,

his property or in his lawful possession : OR OTHERWISE,

Time and Place above libelled,

you the said A—— B—— and C—— D—— did, both and each,  
or one or other of you, wickedly and feloniously, steal and  
theftuously away take from the person or custody of the said  
X—— Y——

The Watch and Money above libelled,

his property or in his lawful possession : And you the said  
C—— D—— have been previously convicted of assault, and are  
habit and repute a thief, and have been previously convicted of  
theft : And you the said A—— B—— and C—— D——, having  
been apprehended and taken before Harry Smith, Esquire, Adv-  
ocate, Sheriff Substitute of Renfrew and Bute, did, each of you  
respectively, in his presence at Greenock, on the

6th day of January, 1874,

emit and subscribe a declaration : Which Declarations being to be  
used in evidence against each of you the said A—— B—— and  
C—— D——, by whom the same were respectively emitted : As  
also the watch above libelled, and a piece of a watch-guard, being  
to be used in evidence against both and each or one or other of  
you : As also an extract or certified copy of a conviction of the  
crime of theft, obtained against you the said C—— D—— before  
the Sheriff Court of Renfrew and Bute, at Greenock, with a jury,  
on the

2nd day of December, 1872,

being to be used in evidence against you the said C—— D——,  
at the trial of you the said A—— B—— and C—— D——, will,  
for that purpose, be in due time lodged in the hands of the Clerk  
of the Circuit Court of Justiciary before which you are to be tried,  
that you may respectively have an opportunity of seeing the same :  
ALL WHICH, or part thereof, being found proven by the verdict of  
an Assize, or admitted by the respective judicial confessions of you  
the said A—— B—— and C—— D——, before the Lord Justice-  
General, Lord Justice-Clerk, and Lords Commissioners of Justiciary  
in a Circuit Court of Justiciary to be holden by them, or by any  
one or more of their number, within the burgh of Glasgow, in the

month of April, in this present year 1874, you the said A— B— and C— D— OUGHT to be punished with the law, to deter others from committing the like crimes in all coming.

ROBERT LEE, A

*List of Witnesses, &c.*

A— B—, now or lately prisoner in the prison of Glasgow, you are Indicted and Accused, at the instance of The Right Honorable EDWARD STRATHEARN GORDON, Her Majesty's Advocate for Scotland, in and to the effect of the following indictment, viz. For the Majesty's interest: THAT ALBEIT by an Act passed in the year of the reign of His late Majesty George the Fourth, called the thirty-eight, intituled "An Act for the more effectual punishment of attempts to murder in certain cases in Scotland," enacted by section second, "that from and after the passing of this Act, if any person shall, within Scotland, wilfully, maliciously, and unlawfully shoot at any of His Majesty's subjects, or shall wilfully, maliciously, and unlawfully present, point, or fire any kind of loaded fire-arms at any of His Majesty's subjects, or shall attempt, by drawing a trigger, or in any other manner to discharge the same at or against his or their person or persons, or shall wilfully, maliciously, and unlawfully stab or cut, or shall wilfully, maliciously, and unlawfully wound, or shall, to the injury of His Majesty's subjects, with intent in so doing or by the means thereof, to murder or to maim, disfigure, or disable such His Majesty's subject or subjects, or with intent to do some grievous bodily harm to such His Majesty's subject or subjects, or shall wilfully, maliciously, and unlawfully administer any poison or any noxious or destructive substance or thing, with intent thereby or by means thereof to murder or disable such His Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such His Majesty's subject or subjects; or shall wilfully, maliciously, and unlawfully attempt to suffocate or to strangle or to drown any of his Majesty's subject or subjects, with the intent thereby, or by means thereof, to murder or disable such His Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such His Majesty's subject or subjects, such person so offending, and

lawfully found guilty, actor, or art and part, of any one or more of the several offences hereinbefore enumerated, shall be held guilty of a capital crime, and shall receive sentence of death accordingly :” AND ALBEIT by the laws of this and of every other well-governed realm ASSAULT, especially when committed by STABBING or CUTTING, and to the effusion of blood, the serious injury of the person, and the danger of life, and by a person who has been previously convicted of assault, is a crime of an heinous nature, and severely punishable : YET TRUE IT IS AND OF VERITY, that you the said A—— B—— are guilty of the capital crime or offence set forth in the above-recited section of the statute above libelled, of wilfully, maliciously, and unlawfully stabbing or cutting one of Her Majesty’s subjects, with intent in so doing, or by means thereof, to murder or to maim, disfigure or disable, such Her Majesty’s said subject, or with intent to do some other grievous bodily harm to such Her Majesty’s said subject, and of the said crime of assault at common law, aggravated as aforesaid, or of one or other of them, actor, or art and part : IN SO FAR AS, on the

31st day of December 1873, or

1st day of January 1874,

Wednesday or  
Thursday.

or on one or other of the days of one or other of the said months, in or near a court or area situated at or near No. 117 Dumbarton Road, Partick, near Glasgow, or in or near a water-closet or privy in said court or area, you the said A—— B—— did, wickedly and feloniously, attack and assault C—— D—— senior, feuar, now or lately residing in or near Dumbarton Road aforesaid, one of her Majesty’s subjects, and did, with a knife or dagger, or some other cutting instrument to the prosecutor unknown, wilfully, maliciously, and unlawfully stab or cut the said C—— D—— senior on or near the left breast, or other part of his person, with intent in so doing, or by means thereof, to murder or to maim, disfigure or disable the said C—— D—— senior, or with intent to do him some other grievous bodily harm ; and the said C—— D—— senior was thereby wounded to the effusion of his blood, the serious injury of his person, and the danger of his life : And you the said A—— B—— had previously evinced malice and ill-will towards the said C—— D—— senior : And you the said A—— B—— have been previously convicted of assault committed on the said C—— D—— senior : And you the said A—— B—— having been apprehended and taken before Alexander Erskine Murray, Esquire, Advocate, Sheriff-Substitute of Lanarkshire, did, in his

presence at Glasgow, on the

6th day of January 1874

emit and subscribe a declaration : Which declaration ; as a pocket-knife, a shirt, and a semmet ; as also two medical reports each dated " Partick, 9th January 1874," and subscribed " J. Paterson, M.D.," or similarly dated and subscribed ; as also medical reports, dated respectively " Partick, 11th March 1874," and " Partick, 21st March 1874," and subscribed " James F. Paterson, M.D., M.R.C.S. England," or similarly dated and subscribed ; as also an extract or certified copy of a conviction of the crime of assault obtained against you the said A—— B——, before the Police Court of the burgh of Partick, on the

21st September 1871,

being to be used in evidence against you the said A—— B—— at your trial, will, for that purpose, be in due time lodged in the hands of the Clerk of the Circuit Court of Justiciary before you are to be tried, that you may have an opportunity of seeing the same : ALL WHICH, or part thereof, being found proven by the verdict of an Assize, or admitted by the judicial confession of the said A—— B——, before the Lord Justice-General, the Lord Justice-Clerk, and Lords Commissioners of Justiciary, in a Court of Justiciary to be holden by them, or by any one or more of their number, within the burgh of Glasgow, in the month of April in this present year 1874, you the said A—— B—— are Brought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

ROBERT LEE, A.

*List of Witnesses, &c.*

## INDEX.



# INDEX.

---

- ABANDONMENT in contracts of insurance, 415.  
its effects, 416.
- ABBREVIATES OF ADJUDICATIONS, 282, 286.
- ABERDEEN ACT, in entails, 488.
- ABIDING BY WRITINGS, either simple or *qualificate*, 666.
- ABSENCE—Decrees in, 633.  
Persons cannot be tried criminally in absence, 672.
- ABSOLVITOR, 613.
- ACCEPTANCE of offer, 309.  
of bills, 319.
- ACCESSION—Acquisition of property by, 127.
- ACCESSORY, in crimes, 648, 676.  
actions, 589.
- ACCOMPLICES must be specially mentioned in criminal letters, 675.  
can an accomplice be received as a witness? 680.
- ACCOUNTS OF MERCHANTS, their prescription, 455.  
how far probative, 620.
- ACT FOR A PROOF, 589. *See* INDEMNITY, PARLIAMENT, SEDEBUNT, &c.
- ACTION, with its several divisions, &c., 573, 583.  
actions, real and personal, 573.  
ordinary and rescissory, 575.  
*rei persecutorie* and *penales*, 583.  
petitory, possessory, and declaratory, 585.  
accessory, 589.  
of wakening, 591.  
*actio directa et contraria* in commodate, 300.  
*redhibitoria*, 334.  
*quantum minoris*, 334.  
actions proceeded anciently on *briefes*, 592.  
now on summonses, 592.  
concourse of actions, 594.  
accumulation of actions, 594.  
procedure in actions, 611.  
short prescription of certain actions, 454 *et seq.*

*contra hereditatem jacentem*, 284, 286.

in implement, 285.

declaratory adjudication, 285.

*pari passu* ranking of adjudications, 281.

completing title of adjudger, 273.

*See also* APPRISING.

ADJUSTMENT of record, 613.

ADMINICLES in proving the tenor, 588.

ADMINISTRATION, foreign letters of, are a good title to sue,

ADMINISTRATOR-IN-LAW, father to pupil children, 85, 93.  
husband, 68, 69.)

ADMIRALTY—High court of, its jurisdiction, 32.

now in Court of Session and Sheriff, 33.

ADOPTION of null deeds, 349.

ADULTERY, simple and notour, 661.

a ground of divorce, 77.

marriage between adulterers prohibited, 77.

ADVOCATE, LORD, as public prosecutor, 647.

ADVOCATION, 21, 22.

AFFINITY, 63. *See* CONSANGUINITY.

AFFREIGHTMENT—Contract of, 410.

AGENT AND PRINCIPAL, 344, 345, 383, 401.

AGENTS, general and special, 344.

frauds by, 345.

liabilities, 346.

for foreign principals, 346.

AGNATES, 83.

ALIBI, 677.

ALIENATIONS, in prejudice of creditors, 579-582.

ALIENS, former disabilities of, 141, 572.

ALIMENT—Obligation of, between relations, 115.

between parents and children, 295, 296.

by an elder brother with respect to his younger. 296

- ALIMENTARY DEBTS**, not arrestable, 442.  
     their prescription, 455.
- ALIMENTARY RIGHTS**, not assignable, 433.
- ALIMONY**. *See* ALIMENT.
- ALLODIAL GOODS**, 140.  
     require no service, 513.
- ALLOWANCE OF APPRISINGS**, 274.
- ALLUVIO**, 125.
- ALTARAGES**, 47.
- ALTIUS NON TOLLENDI**, servitude, 234.
- AMENDMENT** of record, 613.
- ANCESTOR'S DEBT**—Adjudication for, 284
- ANN OR ANNAT**, 56.  
     cannot be assigned by the incumbent, 56  
     goes to the executors, 56.
- ANNEXATION** of lands, *quoad sacra*, 55  
     of churches to monasteries. *See* CHURCH, 251.  
     of the temporality of benefices to the Crown, 254.  
     annexed property of Crown not alienable, 142.
- ANNUALRENT**,  
     when due by statute, 364.  
     by Acts of Sederunt, 364.  
     when accumulated, 365, 366.  
     by the nature of the transaction, 365.  
     by paction, express or tacit, 366.  
     are consignataries liable in annualrent ? 303.  
     or executors ? 547.  
     or judicial factors ? 288.  
     compensation stops the currency of annualrent, 427.  
     rights of, 133, 226.  
     are effectual without actual pointing of the ground, 226.  
     how extinguished. *See* DEBITA FUNDI, 226.
- ANNUITY**, right of executor to portion of, 249.
- ANNUITY OF TEINDS**, 259.
- ANNUS DELIBERANDI**, 505.
- ANTENUPTIAL CONTRACTS**, 493, 599.
- APPARENT HEIR**, 142, 432.  
     his privileges, 247, 291, 504.  
     alienation by an apparent heir, 142.  
     reduction by an apparent heir. *See* CHARGE, 579.
- APPEAL** from Session to Parliament, 23, 24.  
     to Circuit Courts, 31.  
     from Inferior Courts to Court of Session, 22, 29, 617, 634.  
     to House of Peers, 618, 634.
- APPEARANCE**, entering, 613.
- APPORTIONMENT** among heirs of provision, 498.
- APPORTIONMENT ACTS**, 249.
- APPRAISEMENT IN POINDINGS**, 448, 449.
- APPRENTICES**, 388.

denunciation of appraisings, 277.  
reduction of appraisings, 277.  
restricting them to a security, 278.  
redemption of appraisings, 278.  
preference of appraisings, 279.  
legal reversion of appraisings, 271, 275, 279, 281.  
of adjudications, 282.  
adjudications have the same nature with appraisings,

ADJUDICATION.

ARBITERS, 643.

can they be compelled to decide ? 644.  
they cannot exceed the powers given them, 644.  
their powers amply interpreted, 645.

ARBITRARY PUNISHMENT never extended to death, 650.

ARREARS of rents and feu-duties are moveable, 132.

ARRESTMENT,

of persons, 17, 438.  
of moveables, 438.  
in whose hands it may be used, 439.  
on what debts it proceeds, 440.  
on a dependence, 440.  
what debts are arrestable, 441.  
of ships, 441.  
of sum in a policy of insurance, 441.  
of beneficiary's right in trust-estate, 441.  
of wages, 442.  
effect of breach of, 433, 657.  
loosing of, 444.  
does not fall by the arrestee's death, 443.  
preference of arrestments, 446.  
their prescription, 459.  
no bar to poinding, 447, 450.

ASSIGNATIONS,

- how distinguished from dispositions, 433.
- what rights are not assignable, 433.
- intimation of assignments, 434.
- equivalents to intimation, 434.
- intimation may be made by notary, 434.
- how intimation made to companies and corporations, 435.
- private knowledge, effect of, 436.
- what assignments need no intimation, 436.
- retentâ possessione*, 437.
- necessary assignment, 292.
- oath of cedent, can it hurt the assignee? 437.
- onerous assignee not affected by latent exceptions personal to cedent, 438.
- of writs, 145, 685.
- of rents, 146.

ASSIZE, 677.

- of error, 681.
- tholing an, 685.

ASSYTHMENT, 683.

ASTRICTION. *See* THIRLAGE.

ATTAINDER. *See* TREASON.

ATTEMPTS to commit crimes, 658.

AUGMENTATION of Stipend, 51.

AVAIL OF MARRIAGE, 163.

AVERAGE—General, 247, 354.

AWAYGOING CROP, 200.

BACK TACK of wadset land, 220.

BAIL, when admitted in crimes, 673.

BAILIE COURT, 41.

BAIRNS, of a marriage, 493.

BAIRNS' PART. *See* LEGITIM.

BANK AGENTS, cautionary obligations for, 355.

BANK CHEQUE, Appx. p. ix.

BANKING COMPANIES, 392.

BANK-NOTES, pointing of, 447.

BANKRUPTCY, 595.

- alienations by bankrupt prohibited, 577.
- and may now be set aside in Sheriff-court, 577.
- preferences to creditors, how far reducible at common law, 596.
- under 1621, c. 18, 579, 597.
- conjunct and confident persons, 580, 598.
- challenge of preferences by prior and posterior creditors, 579, 598.
- what deeds are reducible, 598.
- defence of proper consideration, 599.
- of previous obligation, 599, 600.
- of necessary cause, 599.
- of obligation in antenuptial contract, 599.
- in postnuptial contract, 600.

how the sixty days are computed, 606.  
date of recording seisin is criterion of preference, 606.  
introduction of sequestration in bankruptcy, 607.  
who may be sequestrated, 607.  
sequestration of deceased debtors, 608.  
recall of sequestration, 608.  
deed of arrangement, 608.  
confirmation of trustee operates as a transfer of bankrupt's  
trustee taking up a lease is liable for arrears of rent, if any  
payment of preferable claims, 610.  
competition between trustee and creditors who have used d  
fraudulent bankruptcy, 668, 669.  
bankruptcy of private companies, compensation in cases of,  
sale of bankrupt estates, 289.

**BANNS**—Publication of, 63, 69.

**BARGAINS** of moveables, how proved, 627, 628.  
prescription of, 459.

**BARONS**,  
greater and lesser, 42.  
originally bound to attend in Parliament, 42.  
jurisdiction of barons, 42.  
how restricted by Heritable Jurisdictions Act, 43.  
how future erections of baronies are restricted, 43.  
their right to heirship moveables, 480.

**BARONY**, its effects and privileges, 43, 154, 186, 472.

**BARTER**, 329, 334.

**BASE RIGHTS**, 143, 211.

**BASTARDS**, how legitimated, 109.  
how far parent is bound to aliment, 295.  
have no heirs but their own issue, 570.  
their power to make settlements, 571.  
incapable of legal succession, 571.

**BATTERY PENDENTE LITE** 660

**BENEFICES, 250.**erection of, into temporal lordships, 254. *See* STIPEND.**BENEFICIUM CEDENDARUM ACTIONUM, 360.***competentie*, 369.*divisionis*, 358.*inventarii*, 510.*ordinis*, or of discussion, 356.**BIGAMY, 645.****BILL-CHAMBER, functions of, 615.****BILL OF EXCHANGE, 318.**

obligations on the drawer, 319.

on the person drawn on, 320.

effect of payment, 320.

indorsation of bills, 319, 320.

bills must be negotiated to save recourse against the drawer, 322.

days of grace, 322.

privileges of bills of exchange by statute, 324.

certain bills not privileged, 324.

debts due by bills not arrestable, 441.

bear interest, 324, 364.

prove their own dates, 318.

prescription of bills, 464.

specimen of, Appx. p. ix.

**BILL OF LADING, 371, 375, 411, Appx. p. x.****BISHOPS—**

the right to their benefices how completed, 46.

their jurisdiction, 57.

**BLACK MAIL, 664.****BLANK WRIT. *See* BOND, SUMMONS.****BLASPHEMY, 650.****BLENCH-HOLDING, 158.****BLEACHING AND DRYING CLOTHES, servitude of, 230.****BLIND PERSONS, subscription of deeds by, 312.****BONA FIDES, if required in prescription, 465. *See* POSSESSION, PAYMENT.****BOND AND DISPOSITION IN SECURITY, Appx. p. v.****BONDS, heritable and moveable, 133-137.**

secluding executors, 134, 138.

heritable bonds not followed by seisin are arrestable, 443.

bonds blank in the creditor's name null, 316.

bond and disposition in security, 227.

bonds for future debts, 227.

**BOOKING TENURE, 153.****BOOKS, merchants', how far probative, 620.****BORDER WARRANTS, 17.****BOROUGH LAWS, 6.****BOROUGHES, royal, or of regality, or barony, 41, 43.**

their jurisdiction, 41, 43.

can the lands of boroughs royal be feued, 142.

**BOTTOMRY, 412, 669.**

clause of relief from public burdens in charter, 147.  
what words constitute a real burden, 155, 156.  
must be recorded, 155.

**BURGAGE HOLDING**, originally a species of ward-holding, 156.  
the borough is the king's vassal in, 158.  
abolished, 158.

**BURGESS** had right to heirship-moveables, 480.

**BURGH**. *See* **BOROUGH**.

**BURYING-GROUND**, right to, 122.

**CALUMNY**, oath of, 624.

**CANALS**, assessment of, 114.

**CANON LAW**, 5, 6.

**CAPITA**, succession *per*, 477.

**CAPTION**, letters of, 638.

abolished, except for non-payment of taxes or aliment, 638.  
messengers or magistrates refusing to concur are liable for t  
what persons secured against caption on civil debts, 101, 63  
sanctuary from caption, 639.  
in what cases caption may be stayed without suspension, 63  
letters of open doors, 642.

**CARRIERS**, liability of, under the edict *Nautæ*, &c., 301, 302.

**CASH-CREDIT BONDS**, 397 *et seq.*

**CASUALTIES OF SUPERIORITY**, 160.

fall by the reverser's death during the legal, 277.  
redemption of, 161.

must not in future depend on uncertain events, 161.

*See* **NON-ENTRY**, **WARD**, &c.

**CASUS AMISSIONIS**, 587.

**CATHOLIC**, securities in a competition, application of, 292.

**CAUTION**, juratory, in suspensions, 636.

in advocations, 322

**CAUTIONERS, simple, 356.**

- bound conjunctly and severally, 357.
- for performance of facts, 357.
- may be interposed to a natural obligation, 358.
- have relief against the debtor, 359.
- except in special cases, 360.
- judicial, 362.
- sums paid by cautioners on distress bear interest, 365.
- are co-cautioners bound to the creditors in *solidum*? 358.
- mutual relief among co-cautioners, 360.
- communication of cases and securities, 361.
- duty of creditors in cautionary obligations for conduct of officials, 357.
- cautioner paying debt is entitled to assignment, 361.
- cautioners bound as principal debtors, 363.

**CAUTIONRY, constitution and proof of, 355.**

- prescription of, 460.
- extent of the Act establishing it, 460.
- extinction of, 359.

**CAVEAT EMPTOR, 332.****CERTIFICATION, in a reduction-improbation, 575, 576.**

- that the party shall be held *pro confesso*, 625.

**CESSIO BONORUM, 640.**

- in what cases competent, and its effects, 640, 641.

**CHAPLANRIES, 47.****CHARACTER OF SERVANT, 382.****CHARGE, on letters of horning, 174.**

- to enter heir, 272.
- either general or special, 273.
- against superiors by heirs, 517.
- by adjudgers, 272, 273, 277, 280, 281.

**CHARTER, 142.**

- original, and by progress, 143.
- different parts of, 143 *et seq.*
- a me* and *de me*, 143.
- of *novodamus*, 144.
- clause of union, 153.
- without seisin an incomplete right, 154.
- by progress implies discharge of bygone duties and casualties, 172.
- by progress abolished, Appx. p. vi.
- bounding, 189.
- specimens of charters, Appx. p. i. *et seq.*

**CHARTER-PARTY, 411, Appx. p. x.****CHAUD MELLA, 657.****CHILD MURDER, 659.****CHILDREN, lawful and unlawful, 107, 109.**

- how far children acquire for their father, 108.
- forisfiliation of, 85, 109, 538.

**CHIROGRAPHUM apud debitorem repertum præsuntur solutum, 424.**

annexed to the Crown, 254.  
how far exempted from taint, 261.  
prescription of, 467.

**CHURCHYARDS**, 122.

**CIRCUIT COURTS OF JUSTICIARY**, 30.

their civil jurisdiction, 31.

presentments and informations in order to trial before them

**CIRCUMDUCTION OF THE TERM**, 631.

**CIRCUMVENTION**, ground of reduction, 578.

**CITATION**, interruption by, 471.

edictal, 16.

domicile for, 14.

*extra territorium*, 15.

**CIVIL LAW**, 5, 6, 7.

**CLAIMS**, buying of, 656.

*CLARE CONSTAT*, precept of, 511.

Crown writ of, 517.

remains in force after death of granter, 346.

**CLERGY**, secular and regular, 45.

**CLOSE TIMES**, 124.

**COGNATES**, 83.

no legal succession by, 476.

**COGNITION of the Insane**, 35.

*COGNITIONIS CAUSA* decree, 283.

**COIN OF THE REALM**, offences against, 652.

*COLLABORATEUR*, doctrine of, 403, 404.

**COLLATERALS**, succession of, 476.

**COLLATION by the heir**, 529.

among the younger children, 540.

of benefices, 49.

**COLLEGE OF JUSTICE**, 26.

their privileges, 28.

**COMMISSARIES, 58.**

- by whom named, 58.
- jurisdiction of, 57-59.
- of Edinburgh, 58.

Sheriff is commissary in his own county, 60.

**COMMISSION AND DILIGENCE AGAINST HAVER, 590.****COMMISSIONERS. See JUSTICIARY, SUPPLY, TRENDS, &c.****COMMISSORIA LEX, pactum legis commissorie in pignoribus, 220.****COMMITMENT OF CRIMINALS, 673.****COMMIXTION, 126.****COMMODATE, 298.****COMMON debtor, 438.**

- employment, 404.

- law, 5, 7.

- pasturage, 231.

- property, common interest and commonalty distinguished, 352.

**COMMONTIES, division of, 231, 351.****COMMUNE FORUM, 15.****COMMUNION OF GOODS, 64, 536.****COMPANIES, joint stock, 392.**

- limited by shares or by guarantee, 392.

- responsibility of managers and directors for misconduct, 393.

- liability for fraud by agents or directors of, 345.

- deeds by, how executed, 392.

**COMPANIES ACT 1862, 392.****COMPARATIO LITERARUM, 667.****COMPENSATION, its effects, 427.**

- in what debts it takes place, 428.

- equitable restrictions, 428.

- not admitted after decree, 429.

- how far pleadable as between company debts and debts of individual partners, 390, 391.

- in wadssets, 219.

- for land, &c., taken under statutory powers, 121.

**COMPETENT AND OMITTED, 633.****COMPETITION, in escheats, 180.**

- in confirmations by the superior, 212.

- in resignations, 215.

- in personal rights of lands, 217.

- in inhibitions, 265.

- in adjudications, 277.

- in diligence *pendente processu*, 291.

- of adjudgers with other rights, 279, 280.

- of catholic with special rights, 292.

- of assignees, 433.

- of arresters, 445.

- of arrester with an assignee, 446.

- of arrester with a poinder, 447.

- of creditors of a defunct, 543.

- COMPETITION of creditors of a defunct with creditors of the heir, 526, 54
- COMPOSITION FOR ENTRY of singular successors, 173, 209.
- COMPOUND INTEREST, 365, 366.
- CONCEALMENT, in contracts, 306, 420.  
in life insurance, 420.  
of pregnancy, 659.
- CONCLUDED CAUSE, 615.
- CONCLUSIONS OF AN ACTION, 587, 612, 613.
- CONCOURSE OF ACTIONS, 594.
- CONDESCENDENCE, 593, 612.
- CONDICTIO INDEBITI, 351.
- CONDITIO SI SINE LIBERIS DECESSERIT, 502.
- CONDITIONS ADJECTED TO OBLIGATIONS, 294, 367.
- CONFESSED, holding as, 625.
- CONFESSION OF A PANEL, judicial and extrajudicial, 679.
- CONFIRMATION by a superior not precisely necessary in base rights, 211  
public rights null without, 212.  
effect of, 214.  
of a testament, 541, 542.  
on general letters discharged, 543.  
*qua* executor-creditor, 543.  
*ad omnia vel male apprehiata*, 544.  
*ad non executi*, 545.  
partial confirmation by the next of kin not now allowed, 546.  
legitim and relict's parts transmit without confirmation, 545.  
special rights need no confirmation, 545, 546.  
not now necessary to vest succession in next of kin, 545.
- CONFUSION, a method of extinguishing and suspending obligations, 432.  
in servitudes, 239.
- CONJUNCT RIGHTS, to strangers, 491.  
to husband and wife, 242, 492.  
to father and son, 492.
- CONJUNCT and confident persons, 580.
- CONQUEST, 478.  
distinction between heritage and, now abolished, 478.  
had no place in female succession, 479.  
provision of, 498.  
heir of, 478.
- CONSANGUINITY AND AFFINITY, Degrees of, forbidden in marriage, 63.  
an objection against a judge, 18, 628.  
against a witness, 628.  
this objection now removed, 629.
- CONSENT requisite to obligations, 294, 305.  
how proved, 306.  
of creditor, a method of extinguishing obligations, 424.
- CONSIGNATION of money, 290, 302.  
of redemption-money, 222. *See* HERITABLE.

- CONSISTORIAL COURT**, 58 *et seq.*  
     the Court of Session the King's great consistory, 59.  
     separate Consistorial Courts abolished, 60.  
     citation in, 16.  
**CONSOLIDATION**, 214, 215, 517.  
**CONSTABLE OF SCOTLAND**, his jurisdiction, 44.  
     inferior constabularies abolished, 44.  
**CONSTABLES TO JUSTICES OF THE PEACE**, 39.  
**CONSTITUTION**, summons of, 272.  
**CONSUETUDINES FEUDORUM**, their authority, 139.  
**CONTRACTS**, 294.  
     division of, 297.  
     consent in, 297.  
     void by statute, 307.  
     at common law, 307.  
     illegal, 329.  
     of affreightment, 410.  
     of bottomry and *respondentia*, 412, 669.  
     of insurance, 413.  
     evidence of, 306, 611.  
     marriage-contract, is it valid without witnesses? 350.  
     marriage-contracts, 493, 495 *et seq.*  
     second marriage-contract, 497.  
     implement in contracts must be mutual, 368.  
     damages for breach of, 305.  
**CONTRAVENTION**. See **LAWBORROWS, TAILZIE**.  
**CONTRIBUTION OF GOODS BY THE *LEX RHODIA***, 354.  
**CONTRIBUTORY NEGLIGENCE**, 405.  
**CONVEYANCES**, present forms of, Appx. p. i. *et seq.*  
**CONVEYANCING ACT**, 1874, part of, Appx. p. vi.  
**CONVOY**, obligation to sail with, 415.  
**CO-OBLIGANTS**, 306.  
**COPARTNERY**. See **SOCIETY**.  
**COPPICE**, 246.  
**COPYRIGHT**, 132.  
**CORNS**, poiding of growing, 448.  
**CORPORATIONS**, entry of, as vassals or feudal subjects, 210.  
***CORREI DEBENDI***, 363.  
**CORROBORATION**—Bond of, 362.  
**COUNCIL**—Privy, of Scotland, their powers and jurisdictions, 24.  
     now abolished, 25.  
**COUNCIL AND SESSION**—Lords of, 25 *et seq.*  
**COURTESY OF SCOTLAND**, 245.  
**CREDITORS**, how secured against alienations by their debtors, 579.  
     See **COMPETITION, RANKING, BANKRUPTCY**.  
**CRIMES**, public and private, 646.  
     when bailable, 673.  
     how divided in regard of the punishment, 646, 647.  
     how, in regard of the object, 646, 647.

- CRIMES only triable by jury, 678.  
     form of trial in, 678 *et seq.*  
     probation of, 678 *et seq.*  
     extinction of, 683 *et seq.*
- CRIMINAL LAW, 646 *et seq.*  
     criminal may insist for his trial, 673.
- CRIMINAL LETTERS, 675.
- CROWN. *See* KING.
- CROWN-CHARTERS, how expedite, 182, 183.
- CULPA LEVIS, LEVISSIMA, and LATA, 299.
- CULPA TENET SUOS AUCTORES, 683.
- CURATORS, 85.  
     form of choosing, 86.  
     who incapable of curatory, 86.  
     what number must concur, 87.  
     curator *ad litem*, 86.  
     *See* ADMINISTRATOR, HUSBAND, INVENTORY, TUTOR.
- CURATORY OF IDIOTS, 101.  
     how conferred, and to whom, 102.  
     curatory-dative of idiots, 103.  
     *curators bonis*, 103, 104.
- CURLING AND SKATING, no servitude of, 229, 230.
- CURRENT ACCOUNT, 457.
- CURRENT RENT, arrestable, 441.
- CURSING OF PARENTS, 659.
- CUSTODY OF CHILDREN, 83, 84.
- CUSTOMARY LAW, 7.
- DAMAGES for breach of contract, and the measure, 305, 306.
- DAMAGES AND INTEREST, 305, 364, 583.
- DAYS OF GRACE, 322.
- DEAD'S PART, 537.
- DEAN OF GUILD, his jurisdiction, 41.
- DEATHBED—The law of, 523.  
     how excluded, 524.  
     the reduction on, to whom competent, 524.  
     what deeds reducible by it, 526.  
     now abolished, 525.
- DEBATE ROLL, 614.
- DEBITA FUNDI, 159.  
     what non-entries are, 170.  
     relief a *debitum fundi*, 172, 173.  
     preference of adjudications on, 228.  
     actions on, 574.
- DEBITOR NON PRÆSUMITUR DONARE, 370.
- DECENNALIS ET TRIENNALIS POSSESSIO, 466.
- DECIMÆ INCLUSÆ, 261.
- DECISIONS OF SESSION, 8.

- DECLARATORY ACTIONS**, 505, 587.  
     declarator of non-entry, 170 *et seq.*  
     declarators of redemption, 222.
- DECLARATORY LAWS**, 3.
- DECLINATURE OF JUDGES**, 17, 18.
- DECREE**, either *in foro* or in absence, 613, 633.  
     when opened by reduction, 635.  
     or by suspension, 635, 636.  
     decree conform, 636.  
     Act abridging the time for extracting decrees of the Court of Session,  
     634. *See EXECUTION.*
- DECREES-ARBITRAL**, 643.  
     have no force till delivered, 326.  
     are favourably interpreted, 645.  
     must exhaust the submission, 645.  
     when reducible, 646.
- DECRETUM, DECRETALS**, 5.
- DEEDS**. *See WRITINGS.*
- DEFAMATORY LIBEL**, 670.
- DEFENCES**, 613.  
     dilatory and peremptory, 694.  
     proponing defence infers prorogation, 19. *See PASSIVE.*
- DEFORCEMENT** of officers of the law, 450, 656, 679.  
     of the officers of custom or excise, 656.
- DEGREES**, forbidden, 62.
- DELEGATION**, 431, 432.
- DELIBERATING**, heir's right of, 505.  
     lost by an apparent heir's immixing, 505. *See EXHIBITION.*
- DELICT**, 584, 647.  
     actions arising from, transmit not against heirs, 584.
- DELIVERY**, constructive, to pass property, 371.  
     delivery of goods in bonded warehouse, 371.  
     distinctions as to delivery in questions of stoppage *in transitu*, 372.  
     delivery-order, 374.  
     partial delivery, 376.
- DELIVERY OF WRITINGS**, 326.  
     when presumed, 327.  
     certain deeds effectual without delivery, 328.  
     whether registration equivalent, 328.
- DEMEMBRATION**, 658.
- DEMURRAGE**, 411.
- DENUNCIATION UPON HORNING**, with its effects, 175.  
     in criminal causes, 176.  
     sums after denunciation bear interest, 365.
- DEPOSITION**—Contract of, 297.  
     of writings, 327.
- DERELICTION** of subvaluation of teinds, 256, 257.
- DESCENDANTS**—Succession of, 476.
- DESERTING THE DIET**, 677.

deserting the diet, 677.

accused persons may be cited to appear at two diets, 675.

**DILATORY DEFENCES, 594.**

**DILIGENCE** against debtors, real and personal, 265.

by creditors of a defunct, or of the next of kin, 543.

inchoate or begun, 265, 445.

where to be published and registered, 37.

against havers, 614.

against witnesses, 614, 631.

diligences *pendente lite* ineffectual, 291.

to interrupt prescription, 470.

or care requisite in contracts, 299.

prestable by tutors and curators, 90, 91.

by executors, 547.

incident, 590.

**DIRECTORS** of joint-stock company, 393.

are trustees, and cannot enter into contracts with the company.

**DISCHARGE OF OBLIGATIONS, 225.**

of duties and casualties, 172.

general discharges, 425.

**DISCHARGE OF OBLIGATIONS, of verbal obligations, 425.**

consecutive discharges, for three terms of years, 426.

**DISCLAMATION, 181.**

**DISCUSSION** of debtors, 356.

of heirs, 503, 523, 526.

**DISHONOUR, notice of, of bills of exchange, 323.**

**DISPOSITION, 433 ; Appx. p. iv. See CHARTER.**

**DISPOSITIVE CLAUSE** the ruling clause in a conveyance, 143.

words necessary to feudal grant or conveyance, 143.

**DISTRESS**—Payment on, 360, 365.

**DITTAY, taking up, 674.**

**DIVISION** of common property and commonities, 351, 352.

of running lands 353

- DOLÉ**, essential to crimes, 647.  
**DOMICILE**, 14.  
     in questions of divorce, 79, 80.  
     succession in moveables regulated by, 530, 542, 546.  
     in criminal matters, 672.  
**DOMINIUM EMINENS**, 121.  
     *directum utile*, 140.  
     what included in *dominium directum*, 159.  
     what in *dominium utile*, 185.  
**DONATARY** to casualties of superiority, 179 *et seq.*  
**DONATION**, 368.  
     *mortis causâ*, 369.  
     not presumed, 369.  
     between husband and wife, 78, 368.  
     by bills, 324.  
**DOUBLE TITLES**, prescription on, 478.  
**DOVECOTES**, 185.  
**DRAWN TEIND**, 253.  
**DRUNKENNESS** no defence in criminal charges, 648.  
**DUELLING**, 659.  
**DYVOUR'S HABIT**, 641.  
  
**EARNEST**, 329.  
**EAVESDROP**, 234.  
**EDICTAL CITATION**, 15.  
**EDINBURGH**, the *communis patria* to persons abroad, 15, 443, 541.  
**EGYPTIANS**, 664.  
**EJECTION**—Action of, 583.  
     letters of ejection, 643.  
**EIK** to a reversion, 219.  
**EMINENT DOMAIN**, 121.  
**EMPHYTEUSIS**, 157.  
**EMPLOYMENT**—Common, 404.  
**ENTAIL**. See **TAILZIE**.  
**ENTAILER'S DEBTS**, tailzied estate continues liable for, 482, 488.  
**ENTRY** of an heir, by service and retour, 504.  
     by precept of *clare constat*, 511.  
     by hasp and staple, 512.  
**ENUMERATION** in statutes, 9.  
**EQUITY**—Court of, 29.  
**ERECTION** of lands into a barony, 42, 154, 189.  
     of benefices into temporal lordships, 254.  
     superiorities of erection belong to the Crown, 258.  
**ERROR** in obligations and contracts, 297, 305.  
     in law, 351.  
**ESCHEAT**, 174.  
     single escheat, 174.  
     it fell formerly on denunciation for civil debt, 175.  
     it still falls on denunciation in criminal causes, 176, 650.

in what case they prescribe, 469.

See also *DEFENCE*.

**EXCHEQUER**—Court of, its jurisdiction and privileges, 31.

transferred to the Court of Session, 32.

what signatures or gifts can be passed in Exchequer with manual, 182.

**EXCISE**, prosecutions in matters of, 40, 41.

**EXCOMMUNICATION**—Penalties of, by the former law, 141,  
now taken off, 141.

**EXCULPATION**, letters of, 676.

**EXECUTION OF SUMMONSES OR LETTERS**, 592, 593, 611:

solemnities of written execution, 311.

executions how far probative, 620.

execution of a testament, 531.

execution of sentences and decree, 637.

execution of criminal sentence suspended in point of time, 1

**EXECUTORS**, 511.

stranger named executor, 532.

who preferred to the office, 542.

executor decerned and confirmed, 542, 546.

their title to sue, 546, 547.

executor surrogate, 543.

executor not liable *ultra vires inventarii*, 547.

they are only trustees, 548.

in what cases they may pay without sentence, 549.

preference of creditors on executry, 549.

exoneration of executor, 550.

relief between heir and executor, 553.

executor-creditor, 444, 543.

co-executors, 546, 547. See *CONFIRMATION*.

office of, not descendible to heirs, 544.

**EXECUTRY**, what debts affect it, 65, 537.

**EXECUTORS**, how obliged 347

FACILITY OF TEMPER, 104-107, 579.

FACTORS ON SEQUESTERED ESTATE,

their powers and duty, 238.

their salary, 238.

factors for pupils and judicial factors, 85. *See* CURATOR BONIS.

arrestment in the hands of factors, 439.

judicial, 238.

caution for, 363.

liable for interest, 365.

FACTORS' RETENTION, 431.

FACULTIES, not lost by prescription, 469.

FALSEHOOD, 665.

false weights and measures, 665. *See* FORGERY, IMPROBATION.

FAMILY, children in, 82, 107, 538.

FAST DAY, whether servants bound to work on, 380.

FATHER IS ADMINISTRATOR-IN-LAW TO HIS CHILDREN *IN*  
*FAMILIA*, 85.

power of a father over his children's provisions, 494.

FAULT OR NEGLIGENCE, 299.

FEAL AND DIVOT, servitude of, 234, 239.

FEAR. *See* FORCE.

FEE OR FEUDAL RIGHT, 139.

what subjects may be given in fee, 140.

who can grant fees, 141.

who can receive them, 141.

principle that a fee cannot be *in pendente*, 492.

FEE AND LIFERENT, 491.

FEE OF PHYSICIANS, 426.

FEE OR WAGES OF SERVANTS, in what cases not due, 335, 379.

how far arrestable, 442.

how far a privileged debt, 549.

the prescription of fees, 455.

FELLOW-SERVANTS take the risk of injuries by one another's fault in the  
common employment, 403, 404.

FERRIES vested in the Crown for public uses, 188.

Crown may grant private right of, 188.

FEU CHARTER, Appx. p. ii.

FEU DUTIES, 160.

when payable, 160.

interest on, 160.

are *debita fundi*, 160.

vassal's continuing liability for, 160.

right of a superior to, cannot prescribe, 470. *See* HERITABLE.

FEU HOLDING, 139, 157.

irritated *ob non solutum canonem*, 166.

FEUS, FEUDAL RIGHTS, 140.

who may grant or acquire, 141.

what heritable rights capable of being granted in, 142.

FOREIGN DEEDS signed in a foreign country, 326.  
FOREIGNERS, jurisdiction over, 16.  
FORESTALLING OF MARKETS, 657.  
FORETHOUGHT FELONY, 657.  
FORGERY, 665. *See* ABIDING, IMPROBATION.  
FORISFAMILIATION, 85, 109, 538.  
FORESTRY, right of, 187.  
FORTALICE, 188.  
FORTHCOMING, 446.  
FORTUNE-TELLING a crime, 651.  
*FORUM DELICTI ET DEPREHENSIONIS*, 672.  
FOWLING, right of, restrained, 123.  
FOUR FORMS, letters of, 637.  
FRAUD, in contracts, 305.  
    reduction *ex capite fraudis*, 579.  
    always proveable by parole, 628.  
FRAUDULENT BANKRUPTCY, 668.  
FUGITATION, for not compearing at a criminal trial, 176.  
*FUGÆ*, arrestment as in *meditatione*, 17, 18.  
FUNGIBLES, what, 298.  
FURIOSITY. *See* IDIOTRY.  
FURTHCOMING ON ARRESTMENT, 445.  
FUTURE DEBTS not arrestable, 441.  
  
GAME, Acts for preserving the, 124,  
    offences against the game laws, 124, 657, 665.  
    lease of game, 193.  
GAMING CONTRACTS and securities for gaming debts, 307.  
GENERAL DISCHARGE, 425.  
GENERAL MANDATE, 344.  
GENERAL LETTERS for confirming discharged, 543. *See* HORN  
*GESTIO PRO HÆREDE*, or behaviour, 517.  
GIFT. *See* DONATION, ESCHEAT, EXCHEQUER.

GOVERNMENT DEPARTMENTS, liability of, for faults of subordinates, 408.

GRACE, act of, 641.

days of grace, 322.

GRASS OF MINISTERS, 54.

GRATUITOUS CAUSE, 143.

gratuitous deeds, what warrandice they imply, 147.

how far ineffectual against tailzies, 482.

against substitutions and clauses of return, 500, 501.

or against creditors, 580.

GUARANTEES, mercantile, 399, 400.

proof of, 306.

GUARANTEE ASSOCIATIONS, 422.

GUILD, Dean of, 41.

GYPSIES, 664.

HABIT AND REPUTE, marriage constituted by, 62.

*HÆREDITAS*,

estate in *hereditate jacente*, cannot be alienated by apparent heir, 142.

decree *cognitionis causæ* against *hereditas jacens*, 544.

adjudication *contra hereditatem jacentem*, 283 *et seq.*

HAIMSUCKEN, 660.

HARBOUR. *See* PORTS.

HASP AND STAPLE, entry and infeftment by, in burgage, 512.

HAVERS, diligence against, 590.

HEAD BOROUGH,

diligences must be published and registered at the head borough of the shire, 37.

HEAD COURTS, attendance at, of sheriffs, barons, &c., 43.

HEIRS OF LINE, heirs general, heirs whatsoever, heirs at law, 476.

heirs-portioners, 476, 478.

birth of nearer heir after opening of succession, 477.

heirs-portioners only liable *pro rata*, 503.

entitled to collate, 529.

heir of conquest, 478.

of tailzie, 432, 481.

of provision, 493.

heir of provision may discharge, but not assign, his right during his father's lifetime, 499.

not liable universally, 503.

heir-male, 481.

heirs-male of the body, 481.

heir of a marriage, 493.

service of heirs, 494.

heir, *active* and *passive*, 502.

the signification of heir whatsoever, 500.

different acceptations of the word heir, 500.

in what order heirs are liable, 503.

heir by inventory, 510.

heirs cannot pursue on the passive titles, 519.

trust-rights for creditors how far heritable, 137.  
 price of lands when heritable, 138.  
 rent of lands how far heritable, 248.  
 the annualrents of a sum due by adjudication heritable, 276.  
 wadset, after consignation, how long heritable, 223.  
 moveable rights, how they may become heritable, 135.  
 moveable rights made heritable by destination require no ser  
 can heritable rights become moveable ? 137.  
 rights partly heritable, partly moveable, 138.  
 what period makes a subject heritable or moveable, 139.  
 what heritable rights are capable of being granted in feu, 14  
**HERITABLE JURISDICTION**, 13, 37, 48.  
**HERITAGE** descends, 477.  
     can now be settled by testament, 480.  
     representation in, 477.  
     writing necessary to all obligations and contracts concerning,  
**HERITORS**, who are, 52, 55.  
     burdens imposed on, in favour of church, 52 *et seq.*  
**HIGHWAYS**, 39.  
     *inter regalia*, 186.  
     title to vindicate, 231.  
     their care, to whom committed, 231.  
**HIRING OF MOVEABLES OR SERVICES**, contract of, 334.  
**"HOLDEN AND REPUTED" JUDGES**, 20.  
**HOLOGRAPH** deeds prove their own dates in the absence of  
     the contrary, 317.  
     their prescription, 462.  
**HOMICIDE**, culpable, 658.  
     casual and justifiable, 658.  
**HOMOLOGATION**, 348.  
**HORNING**, letters of, 174.  
     anciently confined to enforce the prestation of facts, 637.  
     on what number of days horning proceeds, 174.

- HUSBAND**, how far liable for his wife's debts, 67.  
 curator to his wife, 67.  
 authorises rights granted to her by himself, by his bare acceptance, 72.  
*See Jus Mariti.*
- HYPOTHEC**, what, 303.  
 of the landlord on the fruits, 205.  
 its effects by retention and recovery, 206, 207.  
 for the rent of land, abolished, 207.  
 on cattle and on *invecta et illata*, 208.  
 on moveables, 303.  
 titular's hypothec on the fruits, 263.
- IDIOTRY AND FURIOSITY**, brief of, 101.  
 idiots cannot be tried criminally, 672.
- IGNORANTIA JURIS**, 3, 349, 424.
- ILLEGAL CONTRACTS**, 329.
- IMPOSSIBLE FACT**, obligation to perform an, 367.
- IMPOTENCY**, 63.
- IMPRISONMENT FOR DEBT**, 638 *et seq.*  
 abolished, except in certain cases, 638.  
 minors free from, 101.  
 Peers, married women, and Members of Parliament, 638.
- IMPRISONMENT**, wrongous, 661, 673, 674.
- IMPROBATION OF WRITINGS**, before what Court competent, 24, 666.  
 consignment in improbation, 666.  
 proof in, direct and indirect, 666, 667.
- IMPROVEMENTS** by heir of Entail (Montgomerie Act), 490.
- INCEST**, 662.
- INCIDENT DILIGENCE**, 590.
- INCOMPETENCY OF JUDGES**, 22.
- INDEBITI SOLUTIO**, obligation arising from, 351.
- INDEMNITY**, acts of, 683.
- INDICTMENT**, criminal, 676.  
 form of, Appx. p. xiii. *et seq.*
- INDUCIÆ LEGALES**, in summonses, 272, 593, 612.  
 in crimes, 673.  
 in charges on decrees, 637.
- INDUCTION TO A BENEFICE**, 49.
- INDUSTRIAL CROPS**, moveable, 131.
- INFECTMENT**, what, in its proper sense, 150. *See RIGHTS, SEISIN.*
- INHIBITION**, 265.  
 its effects before publication, 265.  
 inhibition on conditional debts, 266.  
 how published, 265.  
 how extended or limited, 266.  
 it is simply prohibitory, 268.  
 does not affect the heir, 268.  
 is founded solely in the inhibitor's interest, 268.  
 purging of inhibition, 269.

**INSOLVENCY**, definition of, 595. *See* **BANKRUPTCY**.

**INSTITOR**, 348.

**INSTITUTE AND SUBSTITUTE**, 481, 500.

**INSTRUMENTS**, notarial, their solemnities, 314.

how far probative, 620.

**INSUFFICIENCY** of goods bought, 333.

**INSURANCE**, contract of, 413.

marine, 413.

form of policy, Appx. p. xi.

risks recovered, 413.

premium, 414.

policy and stamps, 414.

life, 418.

fire, 422.

**INTERDICTS**, 616, 636.

**INTERDICTIONS**, 104.

voluntary, 104.

judicial, 105.

the effect of, how limited, 106.

reduction upon, to whom competent, 107.

office of interdictors, 107.

**INTEREST**. *See* **ANNUALRENT**.

**INTERLOCUTORS OF SESSION**, when final, 634.

**INTERNATIONAL LAW** as to marriage, legitimation, and divo

**INTERPRETATION OF LAW**, 8-10.

**INTERRUPTION OF PRESCRIPTION**, 470.

by citation, 471.

by production of ground of debt in a sequestration, 471.

minority not properly interruption, 472.

interruption of the prescription of real rights, 472.

effects of, 472.

partial, 472.

INTROMISSION BY APPRISERS, 275.

intromission or possession indefinite, 129.

necessary, 552.

vicious, 551.

intromission is proveable by witnesses, 628.

INTRUSION, action of, 583.

INVECTA ET ILLATA. See *HYPOTHEC*, *THIRLAGE*.

INVENTORY, tutorial and curatorial, and penalties of neglecting it, 87, 88.

entry of an heir by inventory, 510.

inventory in confirmations, 542.

INVESTITURE, feudal, 142, 149.

renewal of, abolished, Appx. p. vi.

heir of, 481.

I O U, Appx. p. ix.

IRRITANCY of a feu-holding, 166.

in tailzies, 483.

in wadsets, 220.

ISH OF A TACK, 190.

JETTISON, 354.

JOINT TRADE differs from a society, 342.

JOINT-STOCK COMPANIES, 392.

responsibility of managers and directors, 393-396.

JUDGES, who, 12.

grounds of declining them, 18, 19.

oath to be taken at their admission, 21.

corruption in, 639.

JURISDICTION, 10.

voluntary and contentious, 11.

supreme, inferior, and mixed, 11.

privative and cumulative, 13.

cumulative in the Crown, 23.

personal and heritable, 13.

heritable, now abolished, 37.

proper and delegated, 14.

civil and criminal, 12.

civil, how founded, 14.

criminal, how founded, 671.

prorogated, 19.

King, the fountain of, 11, 23.

JURY, 678. See *INQUEST*.

*JUS CREDITI* of children under marriage-contract, 494.

distinguished from mere *opes successionis*, 495.

under marriage-contract requires no service, 513.

*JUS DELIBERANDI*, 505.

*JUS DEVOLUTUM* falling to the presbytery, 49.

*JUS IN RE* and *JUS AD REM*, 294.

*JUS MARITI et relictae*, 65.

not forfeited by clandestine marriage, 64.

how many make a quorum, 39.  
JUSTICIAR OF SCOTLAND, 29.  
Court of Justiciary, 30.  
criminal jurisdiction of, 30. *See* CIRCUIT COURT.  
JUSTIFICATION OF SLANDER, &c., 408.

KENNING TO A TERCE, 245.  
KING, the fountain of jurisdiction, 11, 23.  
jurisdiction of the, and his council, 25.  
right of applying vacant stipends, 48.  
his right in all lands, without seisin, 153.  
right of ferries, 188.  
he is considered always as the eldest superior, 165.  
how far bound in warrandice, 147.  
positive prescription runs against the, 466.  
succeeds as *ultimus hæres*, 570.  
and consequently to bastards, 570.

KING'S EASE—The, 256.

KING'S EVIDENCE, 680.

KIRK. *See* CHURCH.

KIRK-SESSION, 112, 113.

KNAVESHIP, 235.

LANDS CLAUSES CONSOLIDATION ACT, 121.

LANDS OF HOUSES, property in, in towns, 232, 233.

LAW, 1.

promulgation of, 3.  
declaratory, 4.  
prohibitory, 9.  
interpretation of, 8-10.  
of nature, 1.  
its properties, 3.  
of nations, 2.

- LAW, Canon, 5.  
 its authority in Scotland, 6.  
 written, of Scotland, 5, 7.  
 unwritten, or custom, 7.  
 prohibitory, 9.  
 correctory, 9.  
 feudal, 139.
- LAW AGENTS' retention, 304.  
 liability for negligence or want of skill, 335.
- LAWBURROWS—Letters of, 584.  
 contravention of, 584.
- LEASE. *See* TACK.
- LEASING MAKING, 654, 655.
- LEGACIES, 533.  
 questions of vesting of, 533.  
 verbal, 532.  
*Legatum rei alienæ*, 534.  
 of an heritable bond, 534.  
 general and special, 535.  
 how far proveable by witnesses, 532.  
 not burdens on real estate unless so expressed, 553.
- LEGAL reversion, 219, 271, 275, 277, 281.  
 expiry of the legal, 278, 283.
- LEGATEE—Universal, 533.  
 cannot pursue on the passive titles, 551.
- LEGITIM, 535.  
 to whom, and when due, 538.  
 renunciation of, how inferred, 538.  
 implied discharge of, 539.  
 transmits without confirmation, 545.
- LEGITIMACY, presumed in a service, 509.  
 marriage of the parent presumes, 107.
- LEGITIMATION *per subsequens matrimonium*, 80, 107.  
 letters of, 110.  
 their effect, 571.
- LETTERS of supplement, 15.  
 of four forms, 637.  
 criminal, 676, 677.  
 of exculpation, 676.  
 of slains, 683.  
 or writs issuing in the King's name. *See* CAPTION, HORNING, &c.  
 letters of guarantee, recommendation, &c., 398.
- LIBEL, Defamatory, 409, 670, 671.  
 of a summons, 592.  
 can different grounds of action be thrown into one? 594.  
 a criminal, must be special, 676.
- LICENCE to pursue, 546.
- LIEGE POUSTIE, 523.
- LIFE ASSURANCE, 418.

LIFERENT—Simple, 241.

by reservation, 242.

liferenters must use their right *salva rei substantia*, 246.

and find caution for that purpose, 247.

not liable for rebuilding or repair of manse, 52.

burdened with the heir's aliment, 247.

extinction of liferents, 248.

terms of payment of liferent, 248.

of stocked farm, 247.

wife's conjunct right resolves into a liferent, 243, 492, 493.

ESCHEAT, TRANSMISSION.

LIFERENT BY LAW. See COURTESY, TERCE.

LIMITATION, of cautionary obligations, 460.

See also PRESCRIPTION.

LITIGIOSITY, 277.

LITISCONTESTATION, 595.

LOAN OR *MUTUUM*, contract of, 298.

loan of money must be proved by writing, 627.

LOCALITY, decree of, 51.

LOCATION, contract of, 334.

*LOCUS PENITENTIE* in obligations, and regarding heritage, 310.

LOOSING OF ARRESTMENT, 444.

in what cases caution not admitted, 444. See 363.

effects of losing, 445.

LOSS, total, 415 *et seq.*

LUCRATIVE SUCCESSOR, 521. See *Præceptio Hereditatis*.

LUNATICS, 36, 101, 104.

LYON King of Arms, his office and jurisdiction, 44.

MACHINERY, heritable or moveable? 130.

MAGISTRATES OF BOROUGHES, 41.

election of magistrates and council, 41.

magistrates obliged to concur in executing captions, 638.

liability for security of debtors' prisons, 639.

See PRISONER.

MAILS AND DUTIES, action of, 586.

prescription of, 459.

decree of, 289.

MAJORITY, 82.

MANAGERS bind employers by their contracts, 348.

MANDATE, 343.

special and general, 344.

how mandates expire, 345.

tacit mandate of shipmaster, 347.

mandate in crimes, 648, 649.

MANSE of Ministers, at whose charge to be built and repaired, 52.

free manse, 53.

relief in the designation of manses and glebes, 54.

manses and glebes, allodial, 141.

**MARINE INSURANCE**, policy of, Appx. p. xi.

**MARRIAGE**, 60.

- requires consent *de præsenti*, 61.
- damages for breach of promise of, 61.
- presumed from cohabitation (habit and repute), 62.
- celebration of, 62.
- forbidden degrees in, 63.
- clandestine, 64.
- nullity of, 63.
- dissolution of, 75.
- by death, 75.
- by divorce, 77, 78.
- international law as to, 79.
- casualty of, 163.
- single and double avail, 163, 164.
- marriage due only to the eldest superior, 165.
- married women free from imprisonment for civil debt, 638.
- homologation of marriage-contracts, 348.
- effect of marriage as a legal assignation, 436.
- marriage-contracts. *See* CONTRACT, *HEIR*, 494.

**MASTER AND SERVANT**, law of, 110, 378.

- constitution of contract, 378.
- tacit relocation, 378.
- warning, 379.
- duration of contract, 379.
- enforcement, 39, 380.
- servant, whether bound to work on Sundays and Fast-days, 380.
- sickness of, 381.
- obligations of servant, 380.
- of master, 382.
- liability for servant's acts, 383, 401.
- statutes, 385.
- claim against master for injuries sustained by servant, 402.
- master and apprentice, 388.
- doctrine of *collaborateur* modified, 404.

**MASTER AND SERVANT ACT**, 1867, 385.

**MASTER** of a ship binds his executor or employer, 347.

**MEASURES AND WEIGHTS** in sales, 330.

**MELIOR EST CONDITIO PROHIBENTIS**, 352.

**MENSAL AND COMMON CHURCHES**, 252.

**MERCANTILE GUARANTEES**, 399.

**MERCANTILE LAW AMENDMENT ACT**, 305, 306, 331, 356, 359, 398.

**MESSENGERS-AT-ARMS**, 34.

- powers of pointing, 450.
- deforcement of, 450, 640.

**MILL**, whether a separate tenement, 185.

- a mill cannot be built on lands astricted to another mill, 185.
- mill services, how far implied in thirlage, 235.
- liferents of, 249.

- MINERS AND COLLIERS, 387.
- MINERALS, vassal's rights to, 186.  
     what kinds *inter regalia*, 186.  
     leases of, sterility in, 199.
- MINISTERS, form of their admission, 49. *See* STIPEND.
- MINORS, either pupils or *puberes*, 82, 85, 87.  
     effect of deeds by minors, 95.  
     restitution of minors against hurtful deeds, 96 *et seq.*  
     *minor non tenetur placitare*, 99 *et seq.*  
     a minor *pubes* may be without curators, 85, 87.  
     he can dispose of his own person, 87.  
     other privileges of minors, 271, 284, 467.  
     can minors be tried criminally? 648.
- MINORITY suspends but does not interrupt prescription, 472.
- MISPRISION of treason, 654.
- MISREPRESENTATION. *See* CONCEALMENT.
- MISSIVE letters of sale, 310, 311.  
     *in re mercatorid*, 318.
- MISTAKE IN LAW, 351. *See* IGNORANTIA JURIS.
- MODIFICATION, decree of, 51.
- MOLESTATION, act of, 585.
- MONTGOMERY ACT, 490.
- MORA, 366.
- MORTANCESTRY, brief of, 507.
- MORTIFICATION to the church, or to hospitals, 113, 159.
- MORTIS CAUSA donation, 369.
- MOVEABLE. *See* HEIRSHIP, HERITABLE.
- MULTIPLEPOINDING, action of, 589.
- MULTURES, 225.  
     disposition of a mill with the multures, 235.  
     disposition of lands with multures, 235.  
     extinction of thirlage by the clause of multures, 240.  
     prescription of multures, 459.  
     action of abstracted multures, 238.  
     multures insucken and outsucken, 235.  
     dry multures, 237.
- MUNICIPAL LAW, 2.
- MURDER, 657.  
     self-murder, 658.  
     under trust, 651.  
     of infants, 659.
- MUSSEL FISHING, 188.
- MUTILATION, 658.
- MUTUUM. *See* LOAN.
- NATIONS, law of, 2, 3.
- NATURE, law of, 2.
- NATURALISATION, 141, 572.
- NAUTÆ, CAUPONES, STABULARII, edict, 301.
- NEGLIGENCE in contracts, 299.

NEGLIGENCE of proprietors, 402, 404.

of railway companies, 406.

contributory, 405.

in some cases punishable, 647.

NEGOTIABILITY, 321, 374, 375.

NEGOTIATION OF BILLS, 322.

NEGOTIORUM GESTIO, 350.

NON-ENTRY, 167.

difference between non-entry duties before citation and those after it,  
167 *et seq.*

when excluded, 171.

bygone non-entries, how excluded, 172.

NON MEMINI, oath resolving into a, 626.

NOTARY, clergymen discharged from being notaries, except in testaments, 318.

subscription by a notary for the party, 312.

NOTARIAL. *See* INSTRUMENT.

NOVATION, 431.

NOVODAMUS, clause of, 144.

Crown-charter of novodamus must be signed by the king, 181.

NUDUM PACTUM, 297.

NUNCUPATIVE TESTAMENT, 532.

OATH of party on reference, 620, 621.

affects only the litigants, 622.

not admitted in criminal matters, 621.

qualified oath, 622.

mode of examining, 624.

oath in supplement, 623.

oath of calumny, 624.

a party not compearing to make oath is held *pro confesso*, 625.

oath *in litem*, 626.

of party in crimes, 678.

OBEDIENTIAL OBLIGATIONS, 295.

OBLIGATION, 294.

its divisions, 294.

to pay and to perform (*ad factum præstandum*), 294.

obligations *ob turpem causam*, 297.

obligations and contracts distinguished, 304.

consent in, 305, 306.

their effect, 306.

obligations contracted on Sunday, 308.

gratuitous obligations, 308.

obligation to convey land, 310.

conditional obligations, 367.

accessory obligations, 355.

impossible obligation, 367, 368.

subject-matter of obligation, 367.

*de hereditate viventis*, 367.

obligation of yearly prestations cannot prescribe 469.

OVERSMAN in a submission, 643.  
OYSTER AND MUSSEL FISHINGS, 188.

*PACTUM legis commissorie in pignoribus*, 220.  
    *nudum*, 297.  
    *de quodā litis*, 307.  
    *liberatorium*, 311.  
    *de hereditate viventis*, 367.  
    *de retrovendo*, 334. See COMMISSORIA.

PAGINATION OF DEEDS, 314.

PANNEL, who, 677.

PAPISTS, their incapacities, 87, 141, 572.  
    now removed, 572.

PARAPHERNAL GOODS, 66.

    how far can the wife alienate them ? 72, 434.

PARDON BY SOVEREIGN, 683.

PARENTS AND CHILDREN, 107, 109, 295, 628.  
    deeds by, to children, need not delivery, 328.

*PARES CURIÆ*, 143.

PARLIAMENT of Scotland was our sovereign civil court, 23.  
    now the House of Peers of Great Britain, 24.

    British Parliament, and the Scots representation in it, 24.  
    the right of barons by our old law to sit in Parliament, 42.

    Acts of Parliament, 5.

    private Acts of Parliament, 24.

    Members of Parliament how far free from imprisonment fo

PAROCHIAL BOARD, 112.

PAROLE PROOF, when excluded, 627.

PARRICIDE, 659.

PARSONAGE, benefices are either parsonages or vicarages, 252.

PARTNERSHIP. See SOCIETY.

    bankruptcy of, 390.

PARTS AND DEPARTMENTS See DEPARTMENTS

**PASSIVE TITLES**, vicious intromission, 551.

passive titles introduced only for the security of creditors, 518, 552.

certain passive titles are limited to particular debts, 518.

**PASTURAGE**, right of, 231, 234.

**PATENTS and Copyrights**, are they heritable or moveable? 132.

*PATER est quem nuptiæ demonstrant*, 107, 108.

**PATRONAGE**, 47.

the Pope formerly, now the King, is presumed patron, 47.

patron of provostries and chaplainries, 47.

of collegiate charges, 47.

the right of patron, 48, 251, 260. See **PRESENTATION, VAGANT.**

patronage abolished, 48.

**PAWNBROKERS**, 304.

**PAYMENT**, 423.

rules for applying indefinite payment, 423.

*bond fide*, 424.

before the term, in what case not admitted, 424.

presumed payment, 424.

of lawyer's and physician's fees, 436.

presumed from taciturnity, 427.

how far proveable by witnesses, 627.

**PEERS**—House of, 24.

judgments of House of Peers, 8.

peers free from caption on civil debts, 19, 638.

**PENAL** actions not transmissible against heirs, 584.

*PENDENTE LITE NIHIL INNOVANDUM*, 291.

**PERAMBULATION**—Brief of, 586.

**PEREMPTORY DEFENCES**, 594.

*PERICULUM REI VENDITÆ*, 331.

**PERJURY**, 667.

**PERMUTATION**, how distinguished from sale, 334.

**PERSONAL** property has no locality, but is subject to the law of the owner's domicile, 15.

**PERSONAL** rights of lands, 154, 217, 508.

bond, 133.

Personal Diligence Act, 174.

**PERTINENT OF LANDS**, what included in it, 185, 186, 188.

vassal's right to, 188.

**PETITIONS**, 616.

**PETITORY ACTION**, 585, 586.

**PICKERY**, 663.

**PIRACY**, 665.

**PLANTING**—Offences against, 657, 663.

*PLAGIUM*—Crime of, 663.

**PLEAS** of the Crown, 30, 34, 35, 42.

**PLEDGE**—Contract of, 303.

the subject impignorated cannot be sold without a sentence, 304.

**PLOUGH**—Goods pertaining to, not poindable, 448.

**PLOUGHGRAITH**, crime of destroying it in time of tillage, 657.

*PLURIS PETITIO* in adjudication, 278.

POACHING, 124, 657, 665.

POINDING—Personal, 447.

warrant of, 447.

must there be a previous charge ? 447.

what goods are poindable, 448.

form of poinding and double appreciation, 448, 449.

messenger's power in poinding, 450.

effect of poinding not completed, 450.

ranking of, 450.

whether barred by arrestment, 447, 450.

real, or of the ground, to whom competent, 574.

who must be called as defenders, 575.

its real effects, 575.

POLICE FORCE, &c., 40, 42, 43.

POOR, 111.

assessment for relief of, 112.

mode of assessing canals, railways, &c., 114.

liability for assessment, 113.

exemptions, 114.

persons entitled to relief, 115.

Parochial Board, 112.

Board of Supervision, 112, 113.

settlement, 116 *et seq.*

original and residential, 116.

derivative, 118.

loss of settlement, 117.

POPE, his jurisdiction abolished, 45.

PORT—Right of a free port *inter regalia*, 188.

PORTEOUS ROLL, 674.

POSSESSION, natural and civil, 127.

can two persons possess the same subject *in solidum* ? 127.

*bonâ fide* and *malâ fide* possession, 128.

in moveables presumes property, 129.

but not in lands, 129.

effects of lawful possession, 129.

to what title is it to be ascribed, 129.

effect of promiscuous, 189.

*decennalis et triennalis possessio*, 466.

POSSESSORS—Removing of vicious, and possessors on tolerance, and with title, 203.

POSSESSORY ACTIONS, 585.

the benefit of a possessory judgment, 586.

POSTNUPTIAL CONTRACTS, 496, 497, 600.

need not delivery, 328.

POST-OFFICE OFFENCES, 664.

*PRÆCEPTIO HEREDITATIS*, what and how limited, 519.

*præceptio* and behaviour compared, 520.

*PRÆCIPUUM* of eldest heir-portioner, 478.

*PRÆPOSITURA*, 71. *See* WIFE.

*PRÆVENTO TERMINO*—Summons, 592.

*PRECARIUM*, 300.

*PRECEPT* of seisin, 149.

no longer necessary, 149.

of warning, 202.

of *clare constat*, 511.

against the superior in appraisings, 274.

*See* PROCURATORIES.

*PRECOGNITION* in order to a criminal trial, 674.

*PRE-EMPTION*—Right of, 157.

*PREFERENCE*. *See* COMPETITION, RANKING, BANKRUPTCY.

*PREFERENCES*, undue, by insolvents, 596.

*PRELATE*, 46.

*PRELIMINARY PLEAS*, 594.

*PREMONITION* in redemption of wadsets, 221.

*PRESBYTERY*, their powers as to manses and glebes, 52 *et seq.*

*PRESCRIPTION*, 451.

acquisition of pertinents, &c., by, 188.

positive, 451.

of patronage, 451.

title of positive, in heirs, 452.

in singular successors, 452.

positive, of church-lands and rents, 467.

negative, 453.

title and period of, under Act of 1874, 465.

triennial, 454.

shorter negative, of spuizies, ejections, &c., 454.

of removings, 457.

of retours, 458.

of stipends and multures, 459.

of mails and duties, 459.

of bargains as to moveables, 459.

of arrestments, 460.

of cautionary obligations, 460.

of tutory accounts, 462.

of holograph writings, 462, 623.

of bills, 464.

of church-lands and rents, 467.

of inhibitions, 269.

is *bonâ fides* required in ? 465.

international law as to, 465.

runs *de momento in momentum*, 466.

against whom does it run ? 467.

not *contra non valentem agere*, 467.

certain rights cannot be acquired by, 468.

others cannot be lost by, 469.

in servitudes, 229, 234, 237, 239.

how interrupted, 470.

- PRESCRIPTION**—or suspended, 471.  
of crimes, 684.  
on double titles, 473 *et seq.* See **INTERRUPTION**, **SERVITUDE**.
- PRESENTATION**—Right of, in patrons, 48, 49.  
in presbytery, *jure devoluto*, 49.  
cannot be hurt by the sentence of a Church court, 48.  
*per vices*, 48.  
bond of, 363.
- PRESENTEE**—Objections to, 49, 50.
- PRESUMPTION**, 631.  
*juris et de jure*, 632.  
*juris*, 632.  
*hominis vel judicis*, 632.  
in crimes, 663.  
of payment, 424.  
of payment of lawyers' and physicians' fees, 426.
- PREVENTION IN JURISDICTION**, 13.
- PRICE** of lands bears interest, 365. See **HERITABLE**.
- PRINCE OF SCOTLAND**, 38.  
lands that held ward of the Prince are now blench, 165.
- PRISONERS** for debt, 638.  
in what cases magistrates or jailor liable for prisoner's debt, 639.  
form of liberating a prisoner upon payment, 640.  
in what cases he may be liberated without payment, 640.  
indigent prisoner must be alimanted or liberated, 641.
- PRIZE COURT**, 33.
- PRIVILEGED DEEDS**, 317 *et seq.*  
debts upon the executry, 549.  
summons, 593.
- PROBATE** equivalent to will or extract for completing title, 542, 546.
- PROBATION**, by single combat, 619.  
renouncing, 614.  
by writ, 620.  
by oath on reference, 620.  
by oath *in litem*, 626.  
by witnesses, 627 *et seq.*  
*prout de jure*, 619.  
in crimes, 678.
- PROCEDURE**, civil, 573, 611.  
criminal, 671 *et seq.*  
roll, 614.
- PROCURATOR-FISCAL**, 647, 674.
- PROCURATORIES** of resignation and precepts of seisin do not expire by death of the grantor or grantee, 346.
- PRODIGALS**, or profuse persons, 104.
- PRODUCTION**, satisfying, 613.
- PROHIBITIONS** in tailzies, 482, 488.
- PROHIBITORY LAWS**, 9.
- PROMISE**, 309, 369.

- PROMISE, proof of gratuitous, 611.
- PROMISSORY NOTE, 325, Appx. p. ix.
- PROMULGATION OF LAWS, 3.
- PROOF, by writ or oath, 456 *et seq.* See PROBATION.
- PROPERTY, how restrained, 121, 229 *et seq.*  
     things incapable of, 122.  
     different ways of acquiring or transmitting, 123-127.  
     negligent use of, 402, 405.
- PROPINQUITY, in a judge, 19, 20.  
     in a tutor of law, 83.  
     to a defunct must be set forth in the service, 509.  
     the remotest degree excludes the Crown, 509, 570.
- PROPOSED AND REPELLED, 633.
- PROROGATION OF JURISDICTION, 19, 20.  
     clause of registration does not infer it, 20.  
     not admitted in the King's causes, 21.
- PROSECUTION, for crimes, 647.  
     penalty of vexatious, criminal, 674.  
     private prosecutor must find caution at raising the criminal letters, 675.
- PROTECTION against caption, 639.  
     of wife's property, 70.
- PROTESTING OF BILLS, 322.
- PROTOCOLS, 152.
- PRO-TUTORS AND PRO-CURATORS, 92.  
     are liable as tutors without having their active powers, 92.
- PROVING THE TENOR, action of, 588.
- PROVISIONS OR RIGHTS to children need no delivery, 328.  
     when presumed a donation, 368.  
     provisions to heirs and children, 493.  
     of conquest, 498.  
     sometimes taken to heirs, sometimes to bairns, 498.  
     granting provision to children imports contravention in an heir of  
         tailzie, 488.  
     effect of provision to children existing, 496, 580.  
     provisions on second marriage, 497.  
     provisions in a marriage-contract to bairns give no special right to any  
         one child, 498.  
     provisions to wife and children under the Aberdeen Act, 488.  
     postnuptial provisions to children, 496, 580.  
     to wives, 497, 580. See HEIR.
- PROVOSTRIES, 47.
- PUBLIC RIGHTS, 212.
- PUBLICANS' LICENSES, 39.
- PUPILS, 32.  
     cannot marry, 61.  
     nor execute any deed, 82, 87.  
     caption cannot proceed against them on civil debts, 101.  
     is a pupil capable of dole? 632. See TUTOR, MINOR.
- PURPRESTURE, 181, 188.

- QUADRIENNium UTILE**, 97 *et seq.*  
**QUALITY OF OATHS**, intrinsic and extrinsic, 456, 622.  
**QUARTER SESSIONS**, 39.  
**QUASI CONTRACT**, 297, 350.  
**QUEEN'S EVIDENCE**, 680.  
**QUI CONSULTO** *dat quod non debebat præsumentur donare*, 351.  
**QUOD PURE** *debetur præsenti die debetur*, 192.  
**QUOD STATIM** *liquidari potest pro jam liquido habetur*, 429.  
**QUORUM** of session, 27.  
     of justices of the peace, 40.  
     of tutors, 87.  
**QUOT OF TESTAMENTS** now discharged, 541.  
  
**RAILWAY COMPANIES** liability for injuries to passengers, 406.  
**RANKING AND SALE**, process of, 289.  
     ranking must be fixed before the sale, 290.  
**RAPE**, 662.  
**RATIFICATION BY WIVES**, for what introduced, 74.  
     its form and subject-matter, 74.  
     not precisely necessary for making a right effectual, 74.  
**REAL**. See **BURDEN**, *Debita fundi*.  
**REAL AND PERSONAL RIGHTS**, 294.  
**REBELLION** upon denunciation, 175.  
**RECLAIMING NOTES**, 617.  
**RECOGNITION**, 162.  
     by what deeds inferred, 162.  
     the superior's consent excluded it, 163.  
**RECOMMENDATION**, letters of, 398.  
**RECONVENTION**, 20.  
**RECORD**, framing, closing, adjusting, 612, 613.  
**RECOURSE** in bills, 320.  
     in case of eviction, 148.  
**REDDENDO**, clause of, 145.  
**REDEEMABLE RIGHTS**, 218 *et seq.*  
**REDEMPTION** of appraisings, 278.  
     of wadsets, 219. See **ORDER**, **REVERSION**.  
     declarator of, in wadsets, 222.  
**REDHIBITORIA ACTIO**, 334.  
**REDUCTION**, action of, 575.  
     grounds of, 578.  
     upon the Act 1621, 579 *et seq.*, 597 *et seq.*  
     not good against singular successors, 581.  
     upon the Act 1696, 582, 602.  
     remedy of, when competent, 633.  
     *ex capite lecti*, 523.  
     *ex capite inhibitionis*, 268.  
**REDUCTION-IMPROBATION**, 575.  
     Lord Advocates' concurrence now unnecessary, 577.  
     to whom competent, 576, 577.

- REDUCTION-IMPROBATION**—terms assigned for production, 577.  
 against what writings certification can pass, 577.
- REFERENCE TO OATH.** See **OATH**.
- REGALIA**, 186.  
 large whales are *inter regalia*, 124.
- REGALITY**, Lord of, his former jurisdiction and rights, 36.  
 now abolished, 36.
- REGIAM MAJESTATEM**, and the treatises joined with it, 6.  
 their authority, 6.
- REGISTRATION** of obligations in order to diligence, 60.  
 of marriages, 64.  
 of leases, 209.  
 of conveyances, 151.  
 warrant of registration, 151.  
 of real rights for the security of purchasers, 151, 152, 219, 435.  
 of renunciations of rights of annualrent, 226.  
 orders of redemption require no registration, 223.  
 nor discharges of appraisings, 279.  
 nor resignations *in favorem*, 215.  
 what is deemed sufficient registration of seisin, 151.  
 deeds are registrable after the death either of the granter or grantee,  
 347.  
 registration of ground of debt does not interrupt prescription, 471.
- REGRESS**, letters of, 221.
- REJECTION OF GOODS** sold by bankrupt purchaser, 377.
- RELAXATION**, letters of, their effect, 177.
- RELEVANCY OF CRIMINAL LIBELS**, 677.
- RELICT**, has right to mournings and aliment, 76.  
*jus relicta*, 536.  
 has the relict both right to legal and conventional provisions? 242,  
 244. See **TRECE**.
- RELIEF** in the designation of glebes and manses, and localling of stipends,  
 51, 54.  
 cautioner's relief against the debtor, 359.  
 relief among co-cautioners, 360.  
 among *correi debendi*, 363.  
 among heirs, 504.  
 between heir and executor, 553.  
 casualty of, 172.  
 is it due in feu-holdings? 172.  
 how estimated, 173.  
 obligation of, from public burdens, 146.
- RELOCATION**, tacit, 197, 378.
- REMISSION OF CRIMES BY THE SOVEREIGN**, 683.  
 does not hurt private right, 683.
- REMIT** to man of skill, 616.
- REMOVING**, action of, 203.  
 title requisite to it, 204.  
 removing by judicial factors, 197.

- REMOVING, by apparent heir, 504.  
     summary removings, 203.  
     prescriptions of removings, 457.  
     *See* WARNING.
- RENTALS a kind of tack, 197.  
     they are forfeited by assigning them, 198.
- RENUNCIATION of leases, 201.  
     by an heir charged to enter, 284.  
     not renouncing infers a passive title, 522.  
     renunciation of redeemable rights, 223, 226.  
     proof of, 311.
- REPARATION, 401 *et seq.*
- REPLEDGING, right of, 36, 41.
- REPOSING of a defender, 613.
- REPRESENTATION, right of, in heritage, 477.  
     in moveables, 52.  
     of heirs and executors, 502, 517.
- REPROBATOR, action of, 630.
- REQUISITION, instrument of, 224.  
     does requisition make an heritable sum moveable ? 137.
- RES EXTRA COMMERCIMUM* not the subject of prescription, 468.
- RES FURTIVÆ*, can they be acquired by prescription ? 469.
- RES JUDICATA*, 617.
- RES MERÆ FACULTATIS*, 469.  
     decrees of session, when *res judicata*, 619.
- RES perit suo domino*, 198, 298.
- RES PUBLICÆ*, *Res Universitatis*, *Res Sacre*, 122.  
     now *inter regalia*, 188.
- RES sua nemini servit*, 239.
- RESCISSORY ACTIONS, 575, 587.
- RESET OF THEFT, 647.
- RESIGNATION, instrument of, 214.  
     *ad perpetuam remanentiam*, 214.  
     *in favorem*, 215.  
     is either *propria manibus*, or in virtue of a procuratory, 216.  
     the producing of procuratories and instruments of resignation  
     pensed with after a possession of forty years, 216.
- RESPONDENTIA*, 412.
- RESTITUTION of minors, 96, 99.  
     a natural obligation, 294.
- RESTRAINT OF TRADE, contracts in, 307, 308.
- RESTRICTION, deeds of heritable securities, 228.
- RETENTION, right of, 304, 430.  
     special and general, 430, 431.
- RETOUR, service and, 500.  
     prescription of retours, &c., 458.
- RETOURABLE BRIEF, 506.
- RETOURED DUTY, 168.  
     what understood by that term in casualties, feu-holdings, and teinds,

RETOURED DUTY, what in annualrents and lands not formerly retoured, 169.

and in lands formerly holden ward of the Crown, 170.

duties due for non-entry before citation, 167.

duties must be inserted in services, 168, 509.

RETROCESSION, 433.

RETURN, clause of, 501.

in what cases may the creditor defeat it gratuitously, 501.

REVERSION, legal or conventional, 218.

of wadsets made real, if registered, 219.

certain reversions real without registration, 220.

how far *stricti juris*, 220.

legal reversion of appraisings and adjudications, 271 *et seq.*

runs net against minors, 271.

legal of a special adjudication, 282.

REVOCATION of donation by husbands or wives, 73.

RHODIA LEX DE JACTU, 354.

RIEF, or robbery, 664.

RIGHTS, how acquired, 123.

heritable and moveable, 130 *et seq.*

bearing a tract of future time, 132.

base and public, 143, 211, 212.

feudal right, 156 *et seq.*

real and personal right, 294.

personal right of lands, 217.

RIGHTS, redeemable, 218 *et seq.*

RIOT ACT, 655.

RIVERS, *inter regalia*, 188.

RISK IN SALES, 331.

ROAD TRUSTEES, 231.

ROADS AND BRIDGES ACT, 39.

ROBBERY, 664.

ROMAN LAW, 4.

RUBRIC OF STATUTES, 8.

RUNNING LETTERS, 673.

RUNRIG LANDS, 353.

SALARIES, how far arrestable, 442. *See* SCHOOLMASTER.

SALE, contract of, 329.

the price, how ascertained, 329.

when presumed to be for ready money, 330.

the risk of the thing sold before delivery, 329.

implied and express warranties in, 332, 333.

effects of sale, *a non domino*, 332.

right to reject goods for defects, 334.

buyer if bankrupt may reject the goods, 377.

does stoppage *in transitu* rescind the contract? 377.

warrandice in sales, 332.

insufficiency of the goods sold, 333.

- SALE**, judicial, of bankrupt estates, 287.  
     security of judicial purchasers, 290.  
     the expense of judicial sales, how proposed, 291.  
     judicial sale by an apparent heir, 291.  
     judicial sale of teinds, 257.  
     of ships, how proved, 623.  
     effect of fraud in a contract of, 305, 306.  
     judicial sales not interrupted by *annus*,  
**SALMON-FISHING**, 187.  
**SALTERS**, 43, 110.  
**SANCTUARY**, 639, 657.  
**SCANDAL**, or verbal injuries, 670, 671.  
**SCHOOLMASTER'S** salary divides between  
**SCIENTIFIC AND LITERARY SOCIETIES**,  
     dens, 114.  
**SEAWARE**, for kelp, tenant has no right to,  
**SEAL**, great, 181.  
     privy and quarter seals, and their use, 1  
**SEALING** or stamping of writings, 311.  
**SECURITY**, rights of, 227 *et seq.*  
     bond and disposition in, 227.  
     completing title to, 227.  
**SEDERUNT**, Acts of, 6.  
**SEDITION**, real and verbal, 654.  
**SEDUCTION**, 408.  
**SEISIN**, 149 *et seq.*  
     precept of, 149.  
     instrument of, 150.  
     *propriis manibus*, 150.  
     registration of, 151.  
     where seisin must be taken, 151.  
     feudal right not perfected till seisin, 154  
     but the Crown's right is constituted with  
     when does one seisin serve for different  
     solemnities of, 314.  
     symbols of, 150, 154.  
     ceremony of giving sasine abolished, 150  
     unnecessary now to expedite and record sasine  
     sasine now implies entry with superior,  
**SEMIPLENA PROBATIO**, 624.  
**SENTENCE OF A JUDGE**, 633, 634.  
     when final, 634.  
     cannot be executed before extract, 634.  
     execution of, in civil causes, 637 *et seq.*  
     in crimes, 682.  
**SENTENCE MONEY**, now discharged, 45.  
**SEPARATION OF MAN AND WIFE** (*a n*  
**SEQUELS**, 235.

- SEQUESTRATION, a kind of deposit, 302.  
 judicial sequestration of land estates, 287.  
 in bankruptcy, 607. *See* BANKRUPTCY.  
 equivalent to decree of adjudication, 280.
- SERVANTS, voluntary and necessary, 110.  
 formerly rejected as witnesses, 629. *See* FEE, MASTER AND SERVANT.
- SERVICE OF HEIRS, 35, 506.  
 general service, with its heads, 508.  
 equivalent to general disposition, 507, 508, 516.  
 special service with its heads, 509, 510.  
 service must describe the heir by his special character, 512.  
 special service includes a general service, 513.  
 in what subjects not necessary, 513, 514.  
 must be formerly completed by seisin, 515.  
 competency of second service, 516.  
 personal right to lands now vests without service, 508.
- SERVICES prestable by vassals, 140, 157, 159.  
 indefinite services in tacks discharged, 206. *See* MILL.
- SERVITUDES, natural, legal, and conventional, 229.  
 pass to purchaser as pertinents of lands, 188, 189.  
 by grant and by prescription, 229.  
 certain servitudes cannot be constituted by prescription, 230.  
 servitude of lands, or predial servitudes, 231.  
 rural and urban, 231, 232.  
 of stillicide, 233.  
*non officiendi luminibus, &c.*, 234.  
 of support, 232.  
 of common pasturage, 231.  
 of feal and divot, 234.  
 of thirlage, 235.  
 are *stricti juris*, 239.  
 how extinguished, 239.  
 personal servitudes, 231, 241.  
*See* LIFEFEUT, TERCE, COURTESY, THIRLAGE, COMMONTIES, DIVISION OF.
- SESSION—Court of, 25.  
 the *commune forum*, 15.  
 a court of equity, 29.  
 Lords of Session, by whom named, 26.  
 their qualifications, 27.  
 form of their admission, 27.  
 extraordinary Lords of Session, 27.  
 jurisdiction of session in crimes, 28.  
 in civil causes, 28.  
 Court of Session to sit in two Divisions, 27.  
*See* COLLEGE OF JUSTICE.
- SHELL MARL, tenant has no right to, 191.
- SHERIFF—His jurisdiction, 11, 28, 31, 33, 34 *et seq.*  
 his ministerial powers, 35.

- SHERIFF, Sheriff-depute, 37.  
 his powers in holding courts, 37.  
 his substitutes, 37.  
 Sheriff in that part, 45.  
 Sheriff-fee, 45.
- SHERIFF-OFFICERS, 44.
- SHIP, Co-owners of, not bound by contract made  
 sale of, how proved, 628.
- SHIPMASTER, mandate or agency of, 347.
- SHIPOWNERS' AND MASTERS' LIABILITIES  
 obligations, 411.
- SHIPPERS' OBLIGATIONS, 411.
- SHIPS—Liability in collisions of, 405.
- SHIP'S HUSBAND, 347.
- SICK BILL, 639.
- SIGNATURES, 181, 279.  
 Presenter of, 182.
- SIGNET of the Session, or the King's Signet, 3.  
 all our Supreme Courts have their proper
- SINGLE BILLS, enrolment in, 617.
- SINGULAR SUCCESSORS defined, 476.
- SLAINS—Letters of, 683.
- SLANDER, 408, 670.  
 privileged, 408.
- SLATE AND STONE, servitude of winning, 2.
- SMUGGLING—Contracts tainted by, 330.  
 crime of, 656.
- SOCIETY, how constituted, 336.  
 obligations on the *socii* or partners, 337.  
 rights of creditors, 339.  
*quasi persona* of, 339.  
 dissolution of, 340.  
 joint trade differs from society, 342.
- SOCI CRIMINIS*, or accomplices, 675, 676, 683.
- SOLEMNITIES OF DEEDS, statutory, 9.  
 TESTAMENTS, BILLS.
- SORNERS, 664.
- SOUMING AND ROUMING, 232.
- SPATIANDI, *Jus*, 229.
- SPECIFICATION, 125.  
 specification annexed to decree of general
- SPECIAL CASE, 588.
- SPECIAL POWERS, 559.
- SPES SUCCESSIONIS*, incompetent to adjudge  
 how distinguished from *jus crediti*, 495.
- SPONDET PERITIAM ARTIS*, 335.
- SPUILZIE—Action of, 583.  
 prescription of spuilzie, 454.  
 spuilzie of teinds, 254, 264.

*SQUALOR CARCERIS*, 639.

**STAFF AND BATON**, the symbol of resignation, 216.

**STAMPED PAPER**—Deeds must be written on, 315.

**STATUTE**, subsequent derogates from prior laws, 2.

repealing, construction, 2, 3.

publication of, 3.

commencement of operation, 2, 4.

interpretation, 8.

desuetude of, 7, 8.

**STEELBOW GOODS**—What, and when carried by a disposition of lands, 186.

**STELLIONATE**, 668.

**STERILITY**, in leases of farms and minerals, 199, 200.

**STEWARD**, his former jurisdiction, 37.

all stewardries are now either dissolved or annexed to the Crown, 37.

**STILICIDE**, 233.

**STIPEND**, how provided to the Protestant clergy, 50.

maximum and minimum of stipend, 51.

modified stipend, how secured, 51.

terms of payment of stipend, 56.

prescription of stipends, 459.

augmentation of, restricted, 51. *See* **VACANT**.

*STIRPES*, succession *per*, 478.

**STOPPAGE IN TRANSITU**, 372.

effect of subsale, 374.

effect of partial delivery, 376.

effect of purchaser's bankruptcy, 377.

who may stop, 376.

mode of stopping, 377.

does stoppage rescind the sale? 377.

**STOUTHRIEF**, 664.

**SUBMISSION TO ARBITERS**, 643.

when it expires, 643. *See* **ARBITER**.

**SUBORNATION OF PERJURY**, 668.

**SUBSCRIPTION OF PARTIES**, 312.

by initials, 312.

by notaries, 312.

by blind persons, 312.

of witnesses, 312.

**SUBSCRIPTION** as witnesses, what it imports, 312, 349.

**SUBSTITUTION**, what by the Roman law, what by ours, 500.

simple, 501.

guarded with a prohibition, 501.

**SUBTACK**. *See* **TACK**.

**SUBTENANTS**, removing of, 205.

**SUCCESSORS**, singular and universal, 476.

in heritage, 476.

legal and by destination, 476.

**SUCCESSION**, order of legal, in heritage, 476.

no succession by the mother, 477.

- SUCCESSION**, succession of heirs-portioners, 476, 478.  
 succession *per capita* and *per stirpes*, 477, 478.  
 in moveables, 528.  
 determined by domicile, 530.  
 by destination, 530 *et seq.*  
 of the King as *ultimus hæres*, 570.  
 impediments to, 571.
- SUCCESSOR TITULO LUCRATIVO**, 520. *See Preceptio.*
- SUICIDE**, clause as to, in policies of insurance, 421.  
 is it a crime? 658.
- SUMMONS**, 612.  
 blank and libelled, 593.  
 citation on a blank, makes no interruption of prescription, 471.  
 summonses, *provento terminæ*, 592.  
 libelled, 592.  
 privileged, 593.  
 prescription of, 594.
- SUNDAY**, obligations contracted on, 308.  
 servants not bound to work on, 380.
- SUPERIOR**, 140.  
 had anciently right to the feu, failing heir of the investiture, 209, 56.  
 and so was not obliged to receive singular successors, 209.  
 except apprisers, adjudgers, or judicial purchasers, 210, 273, 274, 29.  
 but now he must receive them, 210.  
 methods of compelling, to receive either singular successors, 274.  
 or heirs, 517.  
 must he receive incorporations? 210.  
 may restrict or renounce his right to casualties, 161.  
 infetment now implies entry with, Appx. p. vi.
- SUPERIORITY**, its fixed rights, 159.  
 its casual rights, 160.  
 admits of no division, 478.  
 tinsel of, 172.
- SUPERVISION**, board of, 112.
- SUPPLY**, Commissioners of, their powers as to police, highways, bridges and ferries, 40, 231.
- SUPPORT**, servitude of, 232.
- SUSPENSION**, bill and letters of, 635.  
 caution in, 615, 635, 636.  
 cannot always pass on caution, 636.  
 when competent, 636.  
 decree of, 637.
- SUSPENSION AND INTERDICT**, 636.
- TACK**, verbal and written, 190.  
 what written tacks are real, and in what respects, 191.  
 clause of retention of rent not good against singular successors, 193.  
 how far *stricti juris*, 194.  
 landlord's power to exclude assignees, 194.

- TACK**, liferent tacks are assignable, 196.  
 can the tacksmen grant a sub tack, and its effects, 196.  
 obligations arising from a, 199.  
 how determined during their currency, 201.  
 registration of, 209.  
 falls to the heir of line, not of conquest, 480.  
 require no service, 513.  
 by a reverser to endure after redemption, 220.  
*See RENTAL, RELOCATION, REMOVING, WARNING.*
- TACIT RELOCATION**, 197, 263, 378.
- TACITURNITY**, effect in creating presumption of payment, 426.  
 sometimes extinguishes obligation, 463.  
 and delinquencies, 683, 684.
- TAILZIE**, 481.  
 must formerly have the superior's consent, 209.  
 with prohibitory clauses, 482.  
 with irritant and resolute clauses, 483.  
 effect of unrecorded entail, 485.  
 fetters directed against heirs of tailzie do not affect institute, 483.  
 principle of enumeration in deeds of, 484.  
 their requisites, registration, &c., 484.  
 fetters must be set forth in deed of disposition, not by reference, 485.  
 they are *strictissimi juris*, 487.  
 destination must be different from legal order of succession, 486.  
 who can make a tailzie, 486.  
 termination of entail by destination coming to an end, 486.  
 contravention, by what inferred, and whom it affects, 488.  
 what is a good prohibition of alienation, and its extent and effect, 488.  
 how the next heir serves on an irritancy, 489.  
 in what cases may the heir of tailzie sell, 489.  
 provisions to wives and children (Aberdeen Act), 488.  
 Montgomery Act, 490.  
 Entail Amendment Act, 490.  
 collation by heir of entail, 529.
- TANTUM ET TALE** doctrine in bankruptcy, 438.
- TEINDS**, 251.  
 how appropriated to cathedrals and monasteries, 251.  
 pontifical exemptions from, 252.  
 parsonage and vicarage, 253, 254.  
 drawn teind, how regulated, 254.  
 heritors may pursue a valuation and sale of, 50.  
 valuation of teind jointly with the stock, 255.  
 or separately, 256.  
 rules for fixing the rent in the valuation, 259.  
 at what price must teinds be sold, 257.  
 what teinds cannot be sold, 258.  
 belonging to patrons, 260.  
 allocation of, and the titular's powers in allocating, 261.  
 what lands are exempted from, 261.

how far for his real debts, 574.

privilege of tenant in prescription, 457.

and in the solemnities of discharges, 314.

**TENEMENT**—Dominant and servient, 231.

**TENENDAS**—Clause of, 144, 145, 240.

**TENOR**—Action of proving the, 537.

**TERCE**, what, and when it takes place, 242, 243.

out of what subjects it is due, and by what debts excluded,  
lesser terce, 244.

terce is now excluded by a special provision, 244.

brief of terce, with its heads, 244.

the widow's right to her terce is acquired before service, 24

terce not excluded by ward, 162.

**TERRITORY OF JUDGE**, 11.

pronouncing judgment, and execution of judgment beyond,

**TESTAMENT**, 531.

heritage may now be settled by, 326, 480.

presumed to be made at time of death, 531.

nuncupative testament, 532.

who can make a testament, 535.

one cannot test in prejudice of the *jus relictæ* or *legitim*, 536

division of a testament, 536.

testament-testamentary, 542.

testament-dative, 542.

solemnities of testaments, 317.

holograph, &c., 532.

nothing which goes by service was the subject of a testame

testamentary debt, 549. See **CONFIRMATION**, **EXECUTION**, **Q**

**THEFT**, 663.

aggravations, 664.

reset of theft, and harbourers of thieves, 664.

theftbote, 655.

- THIRLAGE, when this last sort is presumed, 237.  
 actions competent on, 238.  
 extinction of, 240.  
 cannot be constituted without some title in writing, 237.  
 except in the cases of dry multures, and mills of the King's property,  
 and of church-lands, 237.
- THOLING AN ASSIZE, 685.
- TIGNI IMMITTENDI servitude, 232.
- TIMBER, destroying growing, 657.
- TITHES. *See* TENDS.
- TITLES OF HONOUR,  
 using them infers no passive title, 519.
- TITLES TO LAND ACT, 151, 152, &c.
- TOWN CLERKS—Rights of, 152.
- TRADE-UNION ACT, 387.
- TRADITION, 126.  
 real or symbolical, 126.  
 not always necessary in the transference of property, 127.
- TRANSACTION, 351.
- TRANSFERENCE—Action of, 590.
- TRANSLATION of a right, 433.
- TRANSMISSION of feudal rights, 209 *et seq.*  
 right of liferent not transmissible, 242.  
 of personal rights of lands, 217.  
 “Transmission of Moveable Property Act, 1862,” 434
- TRANSMPT—Action of, 591.
- TREASON, what by the law of Scotland, 651.  
 jurisdiction, 30.  
 statutory, 651.  
 the English law of, made ours, 652.  
 treason-felony, 653.  
 corruption of blood consequent on, 653.  
 misprision of treason, 654.  
 where triable, 672.  
 prescription of, 684.
- TREASURE FOUND, &c., 135.
- TRIAL. *See* JURY TRIAL.
- TRIAL OF CRIMES, procedure for, 673.  
 now by two diets, 675.
- TROUT-FISHING, a pertinent of lands, 187, 188.  
 not included in agricultural lease, 191.  
 no servitude of, 229.
- TRUCK ACT, 386.
- TRUST RIGHTS to creditors, are they heritable or moveable? 137.  
 are they reducible? 582.
- TRUSTEES for public purposes—Liability of, for negligence of servants, 407  
 in bankruptcy, 608.  
 take rights vested in bankrupt *tantum et tale*, 438.
- TRUSTS—Law of, 554.

trust subsists in survivors, 565.  
making up titles where all the trustees have died, 566.  
trusts for creditors, 567.  
radical right of trustor in such trusts, 567.  
trustor entirely divested by disposition of residue, 568.  
trust can only be proved by the writ or oath of the trustee

**TURNPIKE ACT, 231.**

*TURPEM CAUSAM*, restitution of things given *ob*, 297.

**TUTOR NOMINATE, 83.**

named by a mother or stranger, 83.  
of law, who, 83.  
of law is not intrusted with the pupil's person, 84.  
form of serving him, 84.  
dative, 84.  
nominate preferred before the tutor of law or dative, 85.  
in what tutory differs from curatory, 87.  
powers of tutors and curators in acts of administration, 88  
in alienating, 89.  
in transacting doubtful claims, 90.  
their duty as to the minor's person, and the management of  
are all tutors and curators liable in diligence ? 92.  
tutors and curators have regularly no salary, 94.  
may be removed for mal-administration, 94.  
action of tutory, direct and contrary, 93.  
how tutory and curatory expire, 94.  
what if the tutors are named to the joint-management ? 94  
female tutory falls by marriage, 86.  
liable for interest, 366, 367.  
prescription of tutory and curatory accounts, 462.

*See* INVENTORY, QUORUM, PRO-TUTORS, MINORS.

**UDAL LANDS, 151.**

USUCAPION, 451.

USURY, 669.

probation of, 678.

had no place where the creditor undertook the hazard of any uncertain condition, 669.

usury laws abrogated, 176, 669.

UTERINE BROTHER OR SISTER, 477, 528.

has no right of succession, 477.

except in the case of moveables, 528.

VACANT STIPENDS, how to be applied, 48.

fall under the short prescription, 459.

VALUATION OF LANDS, 168.

valued rent, 169.

must now be retoured in lands formerly holden ward of the Crown, 169, 170.

VALUATION OF TEINDS, 255. *See* TEIND.

VASSAL, 140.

can sub-feu, 141.

in what the vassal's right consists, 185 *et seq.*

how far the vassal continues liable for feu-duty after alienation, 160.

VERBAL agreement, 309.

bargain about lands, in what case effectual, 309.

testament and legacy, 531, 533.

VERDICT OF AN ASSIZE, 681.

either general or special, 682.

VERITAS CONFICII—Plea of, 409.

VESTING—Questions of, 533.

VICAR, 252.

vicarage, 252. *See* TEIND.

VICIOUS INTROMISSION, 550, 585.

how inferred, 551.

presumed vicious intromission, by Act of Sederunt, 551.

how excluded, 551.

how purged, 552.

vicious intromitters have relief against each other, 553.

VICIOUS POSSESSORS, 203.

VIOLENCE—Acts of, proveable by witnesses, 628.

in cases of violence or wrong, the extent of the damages is fixed by the party's oath *in litem*, 626.

VIOLENT PROFITS IN REMOVINGS, 205.

how estimated, 205.

VOLUNTARY REDEMPTION OF WADSETS, how executed, 221.

WADSETS, 219 *et seq.*

their ancient and later form, 219 *et seq.*

proper and improper, 224.

usurious wadsets, 225.

a proper wadsetter must cede the possession on the reverser's finding security, 225. *See* REVERSION, REDEMPTION.

now abolished, and converted either into blanch or feu-hold  
WARNING of tenants, 202.

not now previously necessary in removing, 202.

it was never necessary in extraordinary removing, 203.

the effect of warning not insisted in, 205.

between master and servant, 379.

WARRANTICE—Clause of, 145.

simple, from fact and deed, absolute, and implied, 146.

how limited, 146.

is the Crown bound in? 147.

in sales, 332.

in assignments, 148.

effects of warrantice, 148.

real warrantice, 149.

WARRANT, to imprison on criminal charge, 673.

of registration, 151.

WARRANTY in contracts of sale, express and implied, 332, 333

in contracts of assurance, 418.

WEIGHTS AND MEASURES, 330.

WHALES—property in, 124.

WHITSUNDAY is fixed to 15th May, 202.

WIFE, in what cases she can oblige herself, either with or with  
band's consent, 70, 71.

is presumed *præposita negotiis domesticis*, unless she be i  
72.

can test without her husband's consent, 72.

in what cases entitled to a separate aliment, 69.

paraphernalia proper to, 68.

free from personal diligence, 67.

settlements to wives, 493 *et seq.*, 497. See RATIFICATION.

WITCHCRAFT, 651.

there can be now no prosecution on an accusation of witch

WITNESSES—what witnesses admitted in criminal trials, 679, 680.

how far a single witness is sufficient in the proof of crimes, 680.

*See* REPROBATOR.

WOMEN cannot be tutors of law, 86.

in what cases admitted as witnesses, 629.

WOOD, liferenter's right to, 246.

WRONGOUS imprisonment, what, and how punished, 661, 673, 674.

WRITER'S name and designation must be inserted in writings, 313.

WRITING must intervene in all bargains of land-rights, 309, 329.

and in deeds where parties agree that they shall be reduced to writing  
and in testaments, 311.

in what other contracts writing is necessary, 329.

WRITINGS, where not privileged, solemnities of, 311 *et seq.*

may be written bookwise, 314.

holograph writings, 317.

solemnities of testaments, 317.

solemnities of discharges to tenants, and merchants' accounts and  
letters, 318.

of bills, 318.

of writings signed in a foreign country, 326.

of promissory notes, 325. *See* DEPOSITION, DELIVERY.

YEAR AND DAY, how understood, 75, 76.

YEARLY PAYMENTS, obligations for, not subject to prescription, 469.

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## ADDENDA.

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Page 101. To Note (*r*) *add*:—See also Note (*p*), p. 638.

Page 124. To Note (*k*) *add*:—See also 43 & 44 Vict. c. 47, which makes the tenant's right to take ground-game inseparable from his occupation of the land.

Page 144. Note (*u*), for "30 & 31 Vict. c. 101, § 11," *read*:—31 & 32 Vict. c. 101, § 11. This provision, as to the use of a leading name, is repealed, and 37 & 38 Vict. c. 94, § 61 substituted.

Page 174. To Note (*c*) *add*:—See also Note (*p*), p. 638.

Page 277. To Note (*k*) *add*:—of title xi.

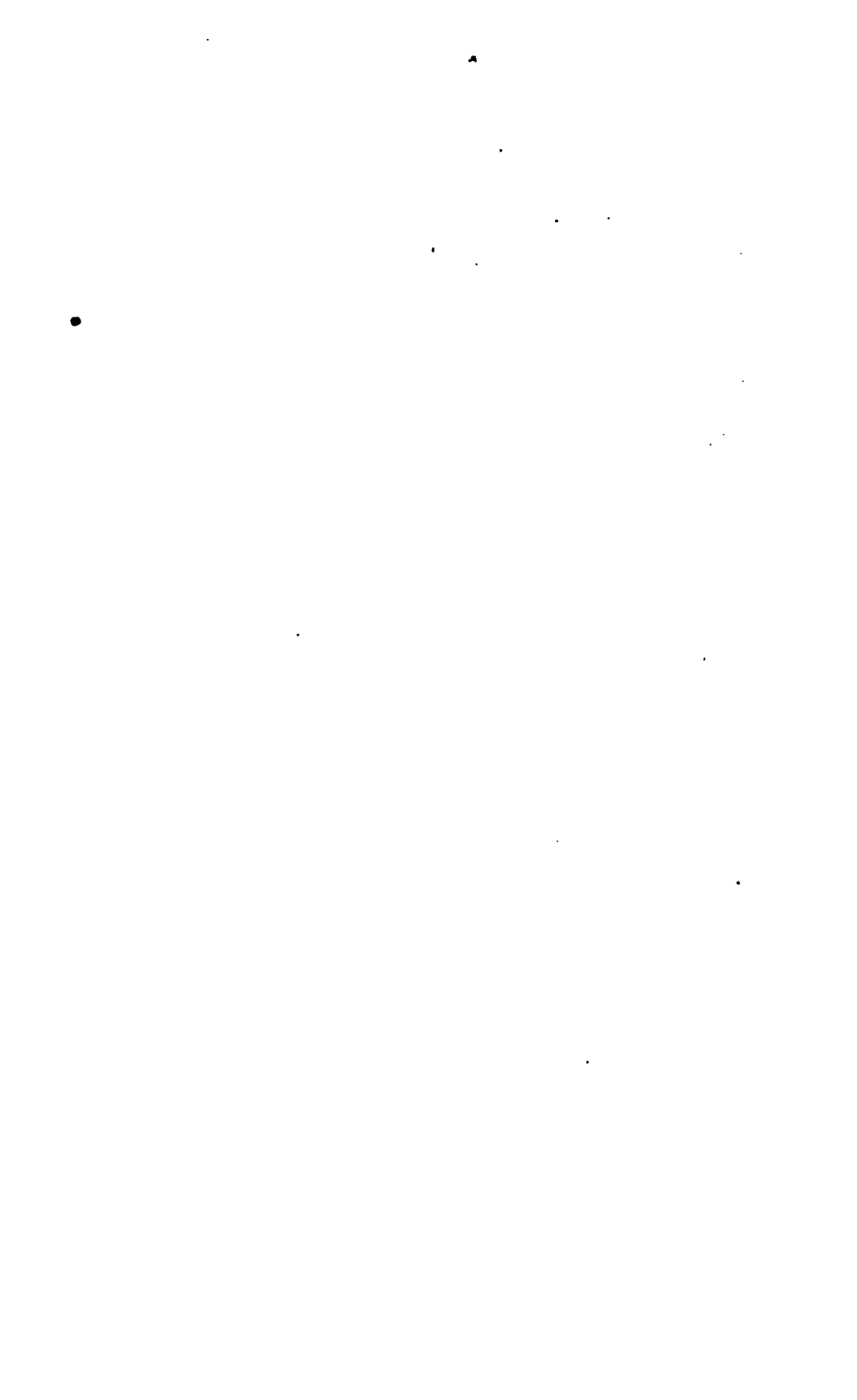
Page 286. For "§ 24" in last line but one, *read*:—c. 101., § 24, and 37 & 38 Vict. c. 94, § 43.

Page 392. To Note (*a*), *add*:—See also 40 & 41 Vict. c. 26, and 42 & 43 Vict. c. 76.

Page 491. To Note (*b*), *add*:—And the power of the only heir in existence under an entail, dated prior to August, 1848, to acquire in fee simple, is no longer conditional upon his being unmarried.

Page 507. In second line of Note (*d*), for "19 & 11," *read*:—10 & 11.

Page 672. For "count," in second line of Note, *read*:—Court.



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